Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

PAMELA R. GOODWIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent, an African-American employee, claims that petitioner violated Title VII of the Civil Rights Act of 1964 by paying her less than similarly situated white employees. Her disparate pay resulted from allegedly discriminatory acts that occurred before the 300-day limitations period set forth in Section 706(e) of Title VII. The court of appeals nevertheless held that respondent's claims were actionable because employee paychecks represent "a continually recurring series of violations, each of which is separately actionable under Title VII." The court of appeals also held that in such cases the employee is entitled to two years — not just 300 days — worth of backpay. The questions presented, on which the courts of appeals are divided, are as follows:

1. Whether pay differentials resulting entirely from allegedly discriminatory acts that occurred prior to the Section 706(e) limitations period are actionable under Title VII.

2. If so, whether backpay is properly limited to the Section 706(e) limitations period or instead may be awarded for a two-year period prior to the filing of a charge.

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner General Motors Corporation has no parent corporation, and no company owns 10 percent or more of its common stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner General Motors Corporation ("GM") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 275 F.3d 1005. The district court's opinion granting summary judgment to GM (App., *infra*, 18a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2002. App., *infra*, 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e)(1), provides:

> A charge under this section shall be filed [with the Equal Employment Opportunity Commission ("EEOC")] within one hundred and eighty days after the alleged unlawful employment practice occurred * * *, except [when] the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice * * *, such charge shall be filed [with the EEOC] * * * within three hundred days after the alleged unlawful employment practice occurred * * *.

STATEMENT

Section 706(e) of Title VII of the Civil Rights Act of 1964 requires that a charge of discrimination be filed with the EEOC within 180 days of the alleged discriminatory act or, as in this case, within 300 days in states where a state or local agency has the authority to grant relief from discriminatory practices. 42 U.S.C. § 2000e-5(e)(1). This time limit "operate[s] as a statute of limitations." *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394-395 & n.12 (1982).

In *National R.R. Passenger Corp.* v. *Morgan*, No. 00-1614, this Court currently is reviewing the Ninth Circuit's holding that the "continuing violation" doctrine permits a claim based on discriminatory conduct that occurred prior to the limitations period so long as it is "related to" discriminatory conduct occurring during the limitations period. As Justice O'Connor noted in the oral argument in *Morgan*, there is a "lopsided split" in the courts on that issue. Jan. 9, 2002 Tr. 31, 52.

However *Morgan* is decided, a significant circuit split will remain on the equally important and closely related issues raised in this case. The decision below rested on a supposed exception to the general rule that discriminatory conduct prior to the limitations period is not actionable even if it produces disparate effects during the limitations period. This purported exception applies when the claim is one for discriminatory pay. In such cases, according to the court below, each paycheck represents a separately actionable violation of Title VII, even if it results entirely from pre-limitations discrimination and a neutral pay policy during

the limitations period. The Tenth Circuit's holding squarely conflicts with *Dasgupta* v. *University of Wis. Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997), in which Judge Posner writing for the Seventh Circuit rejected the argument that a lower salary resulting from pre-limitations discrimination is actionable under Title VII. The decision below also conflicts with decisions of other federal courts and with principles set forth in this Court's precedents addressing the timeliness of Title VII claims.

The court below relied for its ruling on a sentence from this Court's opinion in *Bazemore* v. *Friday*, 478 U.S. 385, 395-96 (1986): "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII" (opinion of Brennan, J., joined by all members of the Court). The court of appeals ignored *Bazemore*'s restriction of that pronouncement to cases where the employer actively engaged in discriminatory practices during the period when a Title VII claim is actionable. As the Seventh Circuit and other federal courts have recognized, *Bazemore* does not authorize treating pay differentials under timeliness rules different from those applicable to other disparate effects that result entirely from pre-limitations discrimination.

The Tenth Circuit compounded its deviation from the law recognized in other circuits by authorizing backpay for a two-year period prior to the filing of plaintiff's charge with the EEOC. Consistency (both logical and statutory) requires that, even if pay disparities resulting solely from pre-limitations discrimination are separately actionable,

backpay should be available only for the 180- or 300-day limitations period established by Section 706(e).

Clear and consistent rules governing the timeliness of EEOC charges and Title VII claims are critically important both to employers and employees. Grafting a tangle of exceptions based on subject matter — pay, promotions, or seniority — onto filing deadlines would be inconsistent with the text and purposes of Section 706(e). Because adverse employment actions commonly result in lower pay throughout an employee's career, allowing each paycheck to revive pre-limitations sources of present pay disparities would effectively nullify the statute of limitations. This Court's intervention is required to ensure that the above-quoted sentence from *Bazemore* not be removed from its context to generate needless confusion on an important threshold requirement for all discrimination claims.

A. Respondent's Discrimination Claim

Respondent Pamela Goodwin, an African-American labor relations representative at General Motors, sued GM for racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, claiming disparate treatment in the form of a salary lower than the salaries of similarly situated white labor relations representatives. As the district court found, the facts relating to the timeliness of her claim "are largely uncontroverted." App., *infra*, 22a.

Goodwin began working for GM in 1976 at its Leeds plant in Kansas City, Missouri. In 1978, she was promoted to supervisor of janitors, a salaried sixth-level position. Goodwin was laid off for two months in June 1980 and,

when recalled, was assigned to a fourth-level clerk position with an 11 percent reduction in salary. App., *infra*, 22a-23a.

Goodwin was laid off again in September 1982 and recalled six months later as a fourth-level clerk performing the duties of a company car coordinator, which at other GM plants was a sixth-level position. App., *infra*, 23a. While working in that position, she was denied a promotion in 1983 on the ground that the Leeds plant was going to be closed. *Ibid.* After being laid off again when GM closed its Leeds plant in August 1987, Goodwin was rehired two months later as a temporary security guard at GM's Fairfax plant in Kansas City, Kansas. *Ibid.* In February 1988, she accepted a position as a clerk in the Fairfax labor relations department. Although she had been told that the clerk position was a fifth-level permanent position, she was placed as a fourth-level temporary clerk with a salary below what she had received as a fourth-level clerk at Leeds. *Ibid.* GM subsequently made Goodwin's position permanent and, in early 1989, promoted her to fifth-level clerk. *Ibid.* In December 1991, GM promoted Goodwin to sixth-level labor relations representative. *Id.* at 24a. When her shift was eliminated in April 1992, she was placed in a fifth-level clerk position with no loss in pay. *Ibid.* In December 1993, she was recalled to her sixth-level position as labor relations representative, a position she continues to hold. *Ibid.*

Goodwin's initial labor relations representative salary was set at more than $300 per month lower than the lowest paid of the other representatives and more than $500 less than the highest paid. App., *infra*, at 5a. At that time, all three of the other labor relations representatives were white.

Although none of the four representatives stood "'head and shoulders' above the rest," due to percentage increases received between 1994 and 1997 the disparity between Goodwin's pay and the other representatives' pay grew larger. *Ibid.* In 1997, Goodwin was being paid $547 less per month than the next lowest paid representative. *Ibid.*

In April 1996, after hearing that a white fifth-level clerk was earning more than she, Goodwin expressed concerns about her compensation level to Tim Danahy, GM's plant personnel director. He assured her that her salary was higher than the clerk's. App., *infra*, at 28a. She then requested larger raises to bring her salary closer to what she believed was the "market range" for her position, a request that GM denied. *Ibid.* At some point between 1992 and 1996, Goodwin also requested a pay raise from Sam Hassler, the general supervisor of the plant's labor relations department, on the ground that her compensation was below the "market range" for her position, which he denied. *Ibid.*[1]

In March 1998, Goodwin found a printout listing the salaries of each of the four representatives and asked GM to explain the disparity. App., *infra*, 6a. In June 1998, GM offered Goodwin a 5 percent annual raise and asked her to sign a statement acknowledging that she had received all the compensation due her. She refused and did not receive the raise. *Ibid.* Other than her complaints about job classifications, raises, and compensation, Goodwin does not

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[1] Mr. Hassler has since died and Mr. Danahy has retired. C.A. App. 122.

recall "any specific discriminatory acts or statements" by any of her supervisors at GM. *Id.* at 29a.

On September 22, 1998, Goodwin filed an employment discrimination charge with the EEOC. App., *infra*, 6a. After receiving a right to sue letter, she sued in the United States District Court for the District of Kansas. Goodwin claimed that GM discriminated by paying her less than similarly situated white employees, forcing her to accept pay decreases when she was recalled from lay-offs in 1980 and 1987-88, failing to promote her in 1983, and providing discriminatory annual raises after 1993. App., *infra*, at 33a.

B. The Decision Of The District Court

After completion of discovery, GM moved for summary judgment. The district court ruled that, because Goodwin filed her charge with the EEOC on September 22, 1998, it could not consider acts occurring more than 300 days before that date, that is, acts occurring prior to November 26, 1997. App., *infra*, 31a. Thus, with the exception of the raise offered in June 1998, Goodwin's allegations were untimely. *Id.* at 42a. The district court rejected Goodwin's plea for application of the "continuing violation" doctrine. First, the court found an insufficient relationship between the pay decreases that Goodwin received in the 1980s and the pay disparities that continued into the limitations period. *Id.* at 33a. Second, the court found that those pay disparities were simply "the lingering effect" of decisions made prior to the limitations period and thus, based on established principles, were not actionable. *Id.* at 39a. Third, the court found "no evidence that GM ever

compared the aggregate level of her salary to that of her co-workers" or otherwise engaged in or intended to engage in discrimination during the limitations period. *Id.* at 37a. The court also rejected Goodwin's arguments for equitable tolling of the statute of limitations, finding that she had been on notice of GM's alleged salary discrimination for "at least two years before she filed a charge with the EEOC." *Id.* at 42a.

Finally, the district court held that the June 1998 pay raise, the only purportedly discriminatory act occurring within the limitations period, did not establish a *prima facie* case of disparate treatment because all the affected employees were offered the same percentage pay increase (which Goodwin turned down). The court therefore granted summary judgment to GM. App., *infra*, 46a.

C. The Decision Of The Court Of Appeals

The Tenth Circuit reversed. In an opinion by District Court Judge Milton Shadur sitting by designation, the court of appeals recognized that continuing effects of discriminatory acts that took place prior to the 300-day limitations period "are generally not actionable under Title VII." App., *infra*, 7a. However, it ruled that in *Bazemore* v. *Friday*, 478 U.S. 385 (1986), this Court established a "crucial distinction" in cases involving discriminatory pay rates. *Ibid.*

The court of appeals focused in particular on this language from *Bazemore*, 478 U.S. at 395: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." According to the court below, that language "articulated

what remains the basic rule as to pay discrimination claims": "pay discrimination must be viewed as a continually recurring series of violations, each of which is separately actionable under Title VII." App., *infra*, 8a. The court concluded that "each race-based discriminatory salary payment constitutes a fresh violation of Title VII," even if the allegedly discriminatory conduct that caused the discriminatory salary payment — in this case employment decisions from the 1980s and early 1990s — occurred long before the limitations period. *Id.* at 9a. The Tenth Circuit found "unpersuasive" the reasoning in *Dasgupta* v. *University of Wis. Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997), in which the Seventh Circuit rejected the argument that *Bazemore* made actionable a lower salary resulting solely from pre-limitations discrimination. *Id.* at 11a.

According to the court below, the purported *Bazemore* exception applies only to wages and not to any other benefits. Thus, it distinguished the Eleventh Circuit's decision in *Carter* v. *West Publ'g Co.*, 225 F.3d 1258 (11th Cir. 2000), which held a discrimination claim untimely, on the ground that it concerned disparate *dividend* checks resulting from an employer's pre-limitations discriminatory stock option policy, not *paychecks* as in this case. App., *infra*, 9a.

The court of appeals also held that Goodwin is entitled to recover backpay for a period extending two years prior to the time she filed her charge with the EEOC, rejecting GM's contention that she should be entitled to no more than 300 days worth of backpay. App., *infra*, 12a. The court cited no statutory basis for its decision, instead relying on a prior Tenth Circuit case stating that such a two-year rule

"strikes a reasonable balance between permitting redress of an ongoing wrong and imposing liability for conduct long past." *Ibid.*

Finally, the court of appeals ruled that Goodwin had established a prima facie case of discrimination and, although GM had articulated a legitimate nondiscriminatory reason for the challenged salary disparities, Goodwin had raised a material factual issue as to whether GM's reasons were pretextual. App., *infra*, 15a-16a. Accordingly, it overturned the grant of summary judgment in GM's favor. *Id.* at 17a.[2]

REASONS FOR GRANTING THE WRIT

The allegedly discriminatory acts on which Goodwin primarily relies — improper pay reductions in 1980 and 1987-88, a failure to promote in 1983, placements at improper grade levels in 1987 and 1988, and insufficient pay raises between 1994 and 1997 — all took place more than 300 days prior to the date that Goodwin filed her discrimination charge with the EEOC. The court of appeals' ruling, that an actionable Title VII claim accrued with each paycheck no matter how long ago the discriminatory conduct that resulted in the challenged pay rate occurred, cannot be reconciled with the established principle that the residual effects or consequences of discriminatory acts that occurred prior to the limitations period are not actionable.

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[2] The court of appeals and the district court accepted Goodwin's factual allegations for purposes of resolving GM's motion for summary judgment. GM will vigorously contest many of her assertions if this case proceeds to trial.

The language from *Bazemore* on which the court of appeals relied does not support a different rule where the lingering effects are pay disparities. In *Bazemore*, the discrimination claims were actionable because the employees' paychecks reflected a policy of discrimination that, although initiated prior to the applicability of Title VII, was actively engaged in after Title VII became applicable. Thus, the paychecks at issue in *Bazemore* were not simply the lingering effects or inevitable consequences of pre-Title VII discrimination but rather reflected an ongoing discriminatory practice of the employer. The absence of such ongoing discrimination during the limitations period led the Seventh Circuit in *Dasgupta* to hold that the plaintiff's pay discrimination claim was time-barred, a conclusion rejected by the court below.

Moreover, even if it were proper to devise unique timeliness rules to govern wage discrimination claims, that would not authorize backpay awards extending beyond the 180- or-300-day limitations period prescribed by Congress, as the court below held. This too is an issue that has divided the courts of appeals and that requires this Court's intervention to ensure a uniform application of federal law.

The conflict over the proper scope of *Bazemore* and its applicability to particular types of discrimination claims is widespread and continues to spawn inconsistent enforcement of the Section 706(e) statute of limitations. Resolving this conflict will permit this Court to clarify the timeliness standard for discriminatory wage claims. A clear and consistent standard will remove the confusion and uncertainty that now confronts employees and employers at the threshold of the Title VII process and that inevitably

resurfaces in court if the initial EEOC charge ripens into a Title VII claim.

I. The Tenth Circuit's Decision Allowing Pay Discrimination Claims Without Regard To The Time Of The Alleged Discrimination Conflicts Sharply With Decisions Of Other Courts Of Appeals.

The ruling below — that pay discrimination claims, unlike other discrimination claims, are actionable even if they arose entirely from discriminatory acts that occurred prior to the limitations period — conflicts with a decision of the Seventh Circuit in a virtually identical case and with decisions of other federal courts.

In *Dasgupta v. University of Wis. Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997), the Seventh Circuit held that a salary discrimination claim was time-barred for failure to comply with the Section 706(e) filing requirement. In the decision below, Judge Shadur criticized Judge Posner's *Dasgupta* opinion for not holding that the plaintiff's salary discrimination claim "constitute[d] a recurring violation during the limitations period." App., *infra*, 10a.

The *Dasgupta* decision is on all fours with this case. The plaintiff, a professor at a state university, filed a charge with the EEOC in 1995, contending that acts of pay discrimination between 1974 and 1987, followed by neutrally applied pay raises, resulted in his salary being lower than that of his peers during the 300-day limitations period. 121 F.3d at 1140. Although his raises were the same as his peers, he claimed that the early acts of discrimination forced him to start from a lower base and

thus to receive a lower salary during the limitations period in violation of Title VII. *Ibid.*

The Seventh Circuit held that the plaintiff's charge was untimely. Citing this Court's precedents, Judge Posner explained that "an untimely Title VII suit cannot be revived by pointing to effects within the limitations period of unlawful acts that occurred earlier." That is because "[a] lingering effect of an unlawful act is not itself an unlawful act [and thus] does not revive an already time-barred illegality." Reviving the pre-limitations violations, the court concluded, "would make employers pay compensation for violations that were no longer actionable and would thus unravel the statute of limitations." *Dasgupta*, 121 F.3d at 1140.

Judge Posner distinguished cases like *Bazemore*, "where the illegal act is repeated during the limitations period," from cases "at the opposite pole," like *Dasgupta*. In *Dasgupta*, "[t]here were no new violations during the limitations period" but merely "a refusal to rectify the consequences of time-barred violations. It is not a violation of Title VII to tell an employee he won't get a raise to bring him up to the salary level that he would have attained had he not been discriminated against at a time so far in the past as to be outside the period during which he could bring a suit seeking relief against that discrimination." 121 F.3d at 1140. The Seventh Circuit subsequently reaffirmed this principle, holding that "the continued receipt of lower paychecks does not revive past allegedly discriminatory conduct." *Snider* v. *Belvidere Township*, 216 F.3d 616, 618 (7th Cir. 2000). And, in a related context, the Federal Circuit favorably cited *Dasgupta* in holding that continuing

"monetary effects" do not constitute "separate violations or render the original violation continuing." *Bosley* v. *Merit Sys. Protection Bd.*, 162 F.3d 665, 667 (Fed. Cir. 1998).

The court below found the *Dasgupta* opinion "unpersuasive" in light of *Bazemore*. App., *infra*, at 11a. But the conflicting approaches of the Tenth and Seventh Circuits reflect more than just a disagreement about how to apply *Bazemore*. The Seventh Circuit sought to reconcile this Court's precedents by finding a common principle, namely, that a Title VII claim requires affirmative discrimination during the limitations period, not just neutral conduct, lingering effects, and a refusal to rectify those effects. The Tenth Circuit subdivided this Court's precedents by subject matter, focusing on a purportedly "crucial distinction" between discrimination claims based on pay as opposed to all other aspects of employment. *Id.* at 7a. This difference of opinion about the meaning of the Title VII statute of limitations has caused considerable confusion in the federal courts.

A recent Title VII case following *Dasgupta*'s approach is *Tademe* v. *St. Cloud State Univ.*, 2001 WL 1584593 (D. Minn. Dec. 10, 2001). In *Tademe*, the plaintiff filed a discriminatory salary charge with the EEOC in 1999. He claimed that, due to his race, he was placed in a lower salary grid than a peer when the two were hired in 1991, resulting in his receiving a lower salary than his peer during the limitations period. The court granted the defendant's motion for summary judgment, explaining that "[e]ven if defendant discriminated against plaintiff in placing him at [a] lower step when he was initially hired in 1991, this violation did not occur within the limitations period." *Id.*

at *5. The court, relying on this Court's precedents, rejected the plaintiff's argument "that each paycheck is a new discriminatory act for statute of limitations purposes," noting that the initial discriminatory decision "was not a repeated and on-going decision made by defendant" and that "the effects of this decision [do] not constitute a continuing violation." *Ibid.*

Other courts, too, have rejected the notion that pay discrimination claims are governed by different timeliness rules than other employment discrimination claims. For example, in *Williams* v. *Munoz*, 106 F. Supp. 2d 40 (D.D.C. 2000), the court explained that this Court "limited" its "actionable paycheck" statement in *Bazemore* to cases involving discriminatory acts "occurring within the statutory period." Thus, the district court reasoned, *Bazemore*'s "separately actionable" ruling does not apply to paycheck differentials occurring during the limitations period that are merely the "current consequences" of a discriminatory promotion decision prior to the limitations period. *Id.* at 43. See also *Niedermeier* v. *Office of Max S. Baucus*, 153 F. Supp. 2d 23, 29 (D.D.C. 2001) (*Bazemore* applies "when a discriminatory system is in place," making "each discriminatory act pursuant to that system [a] new act of discrimination").

Several courts have agreed with the Tenth Circuit that *Bazemore* establishes a special rule for pay discrimination claims, but they generally take a different approach. Whereas the Tenth Circuit in this case rejected a "continuing violation" analysis (App., *infra*, 7a), other courts of appeals have upheld the timeliness of discriminatory pay claims on the ground that "in a Title VII

case claiming discriminatory pay, the receipt of each paycheck is a continuing violation." *Cardenas* v. *Massey*, 269 F.3d 251, 258 (3d Cir. 2001); see also *Ashley* v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir. 1995); *Brinkley-Obu* v. *Hughes Training, Inc.*, 36 F.3d 336, 345-46 (4th Cir. 1994). On the other hand, the Second Circuit has held in an Equal Pay Act case that while each disparate paycheck may be separately actionable, *Bazemore* does not permit application of the "continuing violation" doctrine. *Pollis* v. *New Sch. for Social Research*, 132 F.3d 115, 119 (2d Cir. 1997).

Two cases from the Eleventh Circuit illustrate the line between claims based on the lingering effects of pre-limitations discrimination and claims based on ongoing discrimination during the limitations period. These cases are irreconcilable with the Tenth Circuit's ruling here. In *Carter* v. *West Publ'g Co.*, 225 F.3d 1258 (11th Cir. 2000), female employees received lower dividend checks than male employees because, prior to the limitations period, the employer had denied women an equal opportunity to purchase company stock. The district court found their suit timely under the "continuing violation" theory, but the court of appeals reversed. The Eleventh Circuit reasoned that the employer now operated its dividend program "in a neutral manner" and that the mens' larger dividend checks were but "the inevitable consequence of [the employer's] allegedly discriminatory practice of offering only men the opportunity to purchase stock." *Id.* at 1265. The court reached a different result in *Calloway* v. *Partners Nat'l Health Plans*, 986 F.2d 446 (11th Cir. 1993), where the employer affirmatively retained a practice

of paying black employees less than similarly situated white employees during the limitations period. Because of the ongoing discrimination during the limitations period, the Eleventh Circuit held that the "race based, discriminatory wage payments constitute a continuing violation of Title VII." *Id.* at 449.

Unlike the Tenth Circuit's decision in this case, these Eleventh Circuit decisions apply the proper distinction — between discrimination practiced *during* the limitations period and the effects of discrimination practiced *before* the limitations period. The attempt of the court below to explain away *Carter* as a *dividend check* case rather than a *paycheck* case (App., *infra*, 9a) is incoherent, lacks any support in the statutory text, and departs from the principles established in this Court's precedents.

II. The Tenth Circuit's Decision Cannot Be Reconciled With This Court's Decisions Treating The Date Of Discrimination As Dispositive For Statute Of Limitations Purposes.

In its prior cases addressing the timeliness of Section VII claims, this Court has made clear that a Title VII claim is barred unless the employer engaged in a discriminatory act or practice within the limitations period.

That issue was first presented in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). In *Evans*, the employer's ban on marriage by female flight attendants forced the respondent to resign in 1968. She did not file a claim with respect to that resignation and was rehired in 1972 with a seniority date commencing at that time. With any challenge to the 1968 resignation time-barred, she claimed that her

employer was liable for a "continuing violation" of Title VII because the seniority system treated her less favorably than males hired after her resignation and prior to her reemployment. *Id.* at 557. This Court ruled that her Title VII claim was untimely because the employer's seniority system operated neutrally. Although "the seniority system gives present effect to a past act of discrimination," the employer was "entitled to treat that past act as lawful" after the employee failed to file a discrimination charge within the applicable time limit. *Id.* at 558. As this Court put it, the pre-limitations act of discrimination was "merely an unfortunate event in history which has no present legal consequences." *Ibid.* Explaining that "mere continuity" is not enough to overcome the statute of limitations, this Court emphasized that "the critical question is whether any present violation exists." *Ibid.*

This Court reaffirmed that "present violation" principle in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). In *Ricks*, after a public college denied tenure to a Liberian professor, the college and professor entered into a one-year "terminal" contract providing that his employment would end upon termination. Although he filed a charge with the EEOC more than the applicable 180 days after the tenure decision, he claimed that the terminal contract constituted a "continuing violation" that extended the limitations period until it expired and he was terminated. This Court rejected that argument, holding that the loss of his teaching position was simply "a delayed, but inevitable, consequence of the denial of tenure." *Id.* at 257-58. "[T]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most

painful." *Id.* at 258 (emphasis in original, citation omitted). See also *Chardon* v. *Fernandez*, 454 U.S. 6, 8 (1981) (per curiam) (reaffirming that under *Ricks* "the proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful") (emphasis in original).

This Court again focused on the time of the discriminatory acts, not on the lingering consequences of those acts, in *Lorance* v. *AT&T*, 490 U.S. 900 (1989). In *Lorance*, the plaintiffs were demoted under a neutrally applied seniority system that had been adopted with a discriminatory purpose when a collective bargaining agreement was executed prior to the limitations period. This Court rejected the plaintiffs' "continuing violation" argument, holding that the allegedly unlawful demotions were "wholly dependent on the alleged illegality of signing the underlying agreement" and that the execution date of that agreement therefore triggered the limitations period. *Id.* at 911. The remaining effects of the "discriminatorily adopted system" were "facially neutral" — not "facially discriminatory" — and thus not actionable under Title VII. *Id.* at 912 n.5.

Although *Bazemore* v. *Friday*, 478 U.S. 385 (1986), upheld the timeliness of a Title VII claim, it is perfectly consistent with these principles. *Bazemore* involved a state entity that, before Title VII became applicable to public employers in 1972, had a longstanding practice of segregating black and white workers and paying the black workers less. Although the employer had terminated its segregation policy by 1972, it continued to maintain its "discriminatory pay structure." *Id.* at 390-91, 396 n.6.

This Court held that the employer violated Title VII because it continued to engage in a discriminatory practice after 1972. This was not a case of mere lingering effects but of an affirmative policy after 1972 to pay black workers less than white workers.

> "A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer *continued to engage in that act or practice*, it is liable under that statute. While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that *this discrimination was perpetuated after 1972*, liability may be imposed."

Bazemore, 478 U.S. at 395 (emphasis added).

This was the context in which this Court stated that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, *regardless of the fact that this pattern was begun prior to the effective date of Title VII.*" 478 U.S. at 395-96 (emphasis added). The italicized words (which the opinion below omitted) confirm that this Court was concerned with a "pattern and practice" that, though it began before 1972, was affirmatively maintained afterwards. It was the fact of continuing discrimination, not the fact that the discrimination took the form of a paycheck, that distinguished the situation in *Bazemore* from this Court's "lingering effects" cases.

That *Bazemore* is properly understood as a "continuing discrimination" case is made clear by *Bazemore*'s treatment of prior cases. As the *Bazemore* opinion describes *Evans*, "[b]ecause the employer was not engaged in discriminatory practices at the time [of] suit, there simply was no violation of Title VII." 478 U.S. at 396 n.6. Thus, it was the continuation of discriminatory practices at the time of suit that distinguished *Bazemore* from *Evans*. In both cases, the challenged practice caused pay disparities, but in *Evans* (as in this case but unlike in *Bazemore*) that practice had ceased prior to the limitations period. See also Lisa Tsai, Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79 Tex. L. Rev. 531, 536-537 (2000) ("the employer in *Evans* had terminated the discriminatory policy by the time of the plaintiff's suit, whereas the employer in *Bazemore* had not"). This Court in *Bazemore* also found support for its continuing discrimination approach in *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299 (1977). In *Hazelwood*, "[w]e explained that 'a public employer who from 1972 forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes.'" *Bazemore*, 478 U.S. at 396 n.6, quoting *Hazelwood*, 433 U.S. at 309. The situation was quite different in *Bazemore*, where post-1972 decisions *were* made in a discriminatory way, distinguishing *Bazemore* from *Evans*, *Ricks*, *Lorance*, and this case, where only the residual effects of prior alleged discrimination remained during the limitations period.

In sum, the line between the *Evans-Ricks-Lorance* line of cases and *Bazemore* is this: If disparate treatment during the limitations period is but a lingering effect or an inevitable consequence of pre-limitations discrimination, the plaintiff has no actionable claim. But if that disparate treatment is itself a facially discriminatory act or practice, then the plaintiff may challenge it under Title VII. See 2 Lindemann & Grossman, EMPLOYMENT DISCRIMINATION LAW 1355 (3d ed. 1996) (under *Bazemore*, "[i]f the employer has a formal rule or policy of disparate treatment, and *the system is maintained into the charge-filing period*, the system or practice may be attacked") (emphasis added).

This is a case of lingering effects and consequences, not of continuing discriminatory policies or practices. Goodwin's claim is that GM made several discrete decisions (long before the limitations period began to run) regarding work assignments, promotions, pay levels, and raises, which resulted in her receiving paychecks lower than her peers during the limitations period. Those paychecks were not the result of any affirmative discriminatory conduct within the limitations period, such as the *Bazemore* employer's continuing imposition of its facially discriminatory pay policy. The lack of any discriminatory employment decisions by GM after November 26, 1997, the commencement of the limitations period, led the court of appeals to reach back to ad hoc employment decisions from the 1980s and early 1990s to support its conclusion that Goodwin's lower salary during the limitations period violated Title VII. See App., *infra*, 3a-5a, 14a-15a. But as in *Evans*, "[b]ecause the employer was not engaged in discriminatory practices at the time [of] suit, there simply

was no violation of Title VII." *Bazemore*, 478 U.S. at 396 n.6.

The view of some courts, including the court below, that *Bazemore* reflects a unique timeliness rule for disparate paychecks rather than the established rule for discriminatory practices has led to unnecessarily broad formulations that bear no logical relationship to the facts in *Bazemore* or to the actual cases confronting the courts. Review of this case will permit this Court to ensure that the timeliness of pay discrimination claims is treated in the same manner as the timeliness of other Title VII discrimination claims.

III. This Court Should Also Resolve A Significant Circuit Conflict Over The Period Of Time For Which Backpay Is Available Under Title VII.

The Tenth Circuit's additional ruling that Goodwin is entitled to backpay for the two-year period preceding her EEOC filing (App., *infra*, 12a) sharply conflicts with the position of the Eighth Circuit. The Eighth Circuit limits backpay awards to the 180- or 300-day charge filing period. "[T]he damages recovery period for federal employment discrimination claims in this circuit is the same as the period in which a plaintiff must file her claim." *Madison* v. *IBP, Inc.*, 257 F.3d 780, 796-97 (8th Cir. 2001) (recognizing circuit split), petition for cert. filed, No. 01-985 (Dec. 19, 2001).

The Tenth Circuit's contrary ruling cannot be reconciled with Section 706(e). Even if Goodwin has a timely Title VII claim, there is no reason why she should be entitled to two years' worth of backpay. As in other contexts, even where a lawsuit is timely because the defendant committed

an overt act within the limitations period, the plaintiff may not "recover for the injury caused by old overt acts outside the limitations period." *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 189 (1997). The holding of the court below would reward Goodwin for being dilatory and would further deprive the Section 706(e) limitations period of practical significance.

The Tenth Circuit's backpay ruling was inconsistent with its own liability ruling. If each paycheck received by Goodwin was a "fresh violation" of Title VII, as the court below held (App., *infra*, 9a), Section 706(e) required her to bring an EEOC charge within 300 days of that violation. Thus, one charge filed with the EEOC would sweep in 300 days' worth of checks. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338-339 (1971) (damages for each violation are available only for the limitations period triggered by that violation). By instead entitling her to two years' worth of backpay, the court of appeals more than doubled the backpay allowed by Section 706(e). Accepting this case for review will enable this Court to resolve the conflict over this issue and instruct the federal courts as to the proper limit on Title VII backpay awards.[3]

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[3] The court below did not rely on Section 706(g) of Title VII, which provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." 42 U.S.C. § 2000e-5(g)(1). In any event, that provision was enacted in response to the EEOC's then-position that back pay could extend back to the effective date of Title VII. See H.R. Rep. No. 92-238, at 65-66 (1971). Section 706(g) continues to cap recovery of backpay where equitable considerations toll or delay accrual of the limitations period.

IV. This Court's Review Is Needed To Maintain Consistency In The Formulation Of Title VII Timeliness Rules.

Adverse employment decisions generally result in lower pay throughout an employee's career. If each succeeding paycheck provided a fresh basis for a Title VII claim, as the court of appeals held, employees could routinely revive stale claims and thereby nullify the statute of limitations.

The proper application of the Section 706(e) statute of limitations to pay discrimination claims is an important issue affecting millions of employees and employers as well as state and federal fair employment agencies. Exceptions of the type formulated by the court below, even if well intentioned, undermine the purposes of Title VII. Title VII's timeliness and other procedural requirements "are not to be disregarded by courts out of a vague sympathy for particular litigants" because "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 152 (1984).

Statutes of limitations are "fundamental to a well-ordered judicial system." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980). They ensure "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Young* v. *United States*, 122 S. Ct. 1036, 1039 (2002). This case, with one of GM's primary witnesses dead and another retired (see *supra* n.1), highlights the

unfairness of forcing GM to respond to claims of alleged discrimination that occurred decades ago.

In providing that discrimination charges "*shall* be filed" with the EEOC within 180 or 300 days of the allegedly discriminatory act (42 U.S.C. § 2000e-5(e)(1)), Congress considered and balanced the competing policies of prompt investigation of claims and effective protection against discrimination. It enacted Section 706(e) "to encourage a potential charging party to raise a discrimination claim before it gets stale, for the sake of a reliable result and a speedy end to any illegal practice." *Edelman* v. *Lynchburg College*, No. 00-1072, slip op. at 5 (Mar. 19, 2002). Section 706(e) restricts the "protection of the civil rights laws to those who promptly assert their rights" and protects against "the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-57. By requiring prompt filing of a charge with the EEOC, Congress also sought to encourage the prompt resolution of employment discrimination *charges* before they ripen into employment discrimination *lawsuits*. See *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 764 (1998) (Congress intended to "promote conciliation rather than litigation in the Title VII context").[4]

The "very purpose" of statutes of limitations is to "make it impossible to enforce what [a]re otherwise

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[4] Employment discrimination lawsuits take up an ever-increasing portion of the federal courts' docket, having tripled between 1990 and 1998. U.S. Dept. of Justice, *Civil Rights Complaints in U.S. District Courts, 1990-98*, fig. 1, http://www.ojp.usdoj.gov/bjs/abstract/crcusdc.htm.

perfectly valid claims." *United States* v. *Kubrick*, 444 U.S. 111, 125 (1979). The "harsh statute of limitations" that Congress enacted "has created pressure to evade it, and evasions always confuse the law." Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 Law & Contemp. Probs. 53, 56 (Autumn 1986). The decision below was just such an attempt to evade the law. It did not rest on one of the established exceptions to strict filing requirements based on equitable considerations, such as fraudulent concealment or the discovery rule. See *Baldwin County*, 466 U.S. at 151. Instead, it rested on a judge-made distinction between pay and other types of discrimination that has no basis in the statutory text. The charge-filing period is the "acceptable delay" established by Congress, which gave "no indication" that it considered other delays to be "equally acceptable." *International Union of Elec. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976). Concerns about the unfairness of the limitations period enacted by Congress must be addressed by Congress, not by judicially created exceptions to unambiguous statutes. See *Kubrick*, 444 U.S. at 117 (when Congress has established a specific limitations period, courts "are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims").

"[T]he legal rules fashioned to implement Title VII should [be] consistent with other Title VII policies." *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 228 (1982). Clear and consistent rules governing the timeliness of discrimination claims are critically important for both employers and employees. Employers will never obtain the repose that

Section 706(e) was designed to provide if they face a proliferating series of inconsistent exceptions, one for pay, another for dividends, another for seniority, and still others for discharges, downgradings, and unfavorable references. See *Hamilton* v. *1st Source Bank*, 928 F.2d 86, 88 (4th Cir. 1990) (en banc) ("a perceived difference between discriminatory discharge claims and discriminatory pay claims" for accrual purposes is "a distinction without a difference"). Employees, who often are not represented by lawyers when they file an EEOC charge, have an even greater need for a clear timeliness rule. Such a rule should be consistent with the statutory language and provide that Title VII claims are timely only where discriminatory acts or practices — as opposed to mere lingering effects or inevitable consequences of pre-limitations discrimination — occurred during the 180 or 300 days prior to the filing of a charge with the EEOC. Cf. *United States* v. *Ibarra*, 502 U.S. 1, 6 (1991) (per curiam) (a "clear general rule" governing the timeliness of appeals will prevent litigants from being "required to guess at their peril the date on which the time to appeal commences to run").

The court below sought to have it both ways, holding both that each paycheck creates a "separately actionable" Title VII claim *and* that it is part of "a continually recurring series of violations." App., *infra*, 8a. By calling each paycheck "separately actionable," it sought to avoid this Court's precedents forbidding Title VII claims based solely on pre-limitations conduct. But because Goodwin offered no proof of discrimination with respect to any such actionable paycheck, the court of appeals had to reach back to allegedly discriminatory acts that occurred long before

the limitations period. See App., *infra*, 15a. By relying on a "continually recurring series" of pay disparities resulting entirely from pre-limitations discrimination, the court below sought to accomplish just what this Court's precedents forbid — imposing liability where there was no discriminatory conduct during the limitations period.[5]

The implications of the Tenth Circuit's decision are startling. Most acts of sporadic discrimination, whether they concern job classifications, promotions, seniority, or some other aspect of employment, result in the employee's receiving lower pay than if the discrimination had never occurred. In each such case, a discriminatory decision early in an employee's career could become a Title VII claim decades later merely because the employee's pay never caught up to that of promoted peers. Employees should not be able to hold onto potential discrimination claims indefinitely, "sleeping on their rights." *Klehr*, 521 U.S. at 187. That would effectively vitiate the statute of limitations for all discrimination affecting employee pay. By viewing paychecks as a "continually recurring series of

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[5] The court of appeals summarily concluded that Goodwin "had no way of knowing" of the pay disparities about which she complains. App., *infra*, 11a. But under the court of appeals' approach, Goodwin's discovery of the disparities or lack thereof is irrelevant. Even if she knew of the claimed violation years ago, each paycheck would provide her with a fresh chance to sue. In fact, Goodwin had complained about her pay to GM officials at least as early as 1996 (see *supra* p. 6), leading the district court to find that she had been on notice of GM's alleged salary discrimination for "at least two years before she filed a charge with the EEOC." App., *infra*, 42a.

violations," the court of appeals stretched Congress's 300-day statute of limitations into one at least as long as the employee's career. Review by this Court is required to remove this threat of near-indefinite liability based on an incoherent distinction between pay and other forms of employment discrimination.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this case should be held pending this Court's decision in *National R.R. Passenger Corp.* v. *Morgan*, No. 00-1614.[6]

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[6] A grant of certiorari is appropriate because *Morgan* does not implicate the "separately actionable paycheck" exception relied on by the Tenth Circuit.

Respectfully submitted.

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APRIL 2002

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-3019

PAMELA R. GOODWIN, Plaintiff-Appellant

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee

Appeal from the United States District Court
for the District of Kansas
No. 99-2241-CM — Carlos Murguia, *District Judge*

Decided January 3, 2002

EBEL and PORFILIO, *Circuit Judges*

SHADUR, *District Judge*[1]

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[1] The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by

SHADUR, *District Judge*. Pamela Goodwin ("Goodwin") has sued her employer General Motors Corporation ("General Motors"), charging it with racial discrimination actionable under Title VII of the Civil Rights Act of 1964 ("Title VII," 42 U.S.C. §§ 2000e to 2000e-17). Goodwin, who is African American, alleges that General Motors has discriminated against her over the years by paying her a significantly lower salary than similarly-situated white employees.

After reviewing the parties' submissions on General Motors' motion for summary judgment under Fed.R.Civ.P. ("Rule") 56, the district court granted that motion on the grounds (1) that the majority of Goodwin's claims for pay discrimination were time-barred because her pay rates had been established more than 300 days before she filed her charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and (2) that Goodwin had failed to present a prima facie case for discrimination related to the single claim that was not time-barred.[2]

STANDARD OF REVIEW

We review the grant of summary judgment de novo, applying the same standard as did the district court (*Brown*

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designation.

[2] Goodwin's initial complaint had also asserted claims under 42 U.S.C. § 1981. Because she failed to address those claims in response to General Motors' Rule 56 motion, the district court deemed them abandoned in the course of granting summary judgment to General Motors. That abandonment ruling has not been appealed.

v. Gray, 227 F.3d 1278, 1285 (10th Circ. 2000)). Under Rule 56(C) summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Familiar Rule 56 principles impose on General Motors as movant the initial burden of establishing the lack of a genuine issue of material fact (*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). On appellate review we, like the district court, are required to draw all reasonable inferences in the light most favorable to nonmovant Goodwin (*Brown*, 227 F.3d at 1285).

FACTS

Goodwin began working for General Motors in 1976 in a pre-foreman training program at its Leeds plant in Kansas City, Missouri. During the next decade she held a number of different positions there, including supervisor over janitorial services, supervisor over sanitation and senior clerk. Goodwin was also laid off several times as a result of reductions in force. Following each layoff she was recalled, although she experienced some salary reductions as a result of the layoff periods.

In August 1987 General Motors closed the Leeds plant and again placed Goodwin on layoff status. In October 1987 General Motors rehired her to work as a temporary security guard at its Fairfax plant in Kansas City, Kansas. Several months later Goodwin accepted a position as clerk in the labor relations department of that plant. When she

had interviewed for that position she was informed that it was a permanent fifth-level position,[3] but upon being hired she was placed in a temporary fourth-level position. Her salary was even lower than what she had received as a fourth-level clerk at the Leeds plant, and she was told that this was because Fairfax plant workers were paid less than those at the Leeds plant. After Goodwin had applied to transfer to another General Motors plant, her position was made permanent, and her salary was later adjusted to reflect a fifth-level rate of pay. In late 1991 Goodwin was promoted to the sixth-level position of labor relations representative ("representative"), a position that she continues to hold today.[4]

While employed by General Motors, Goodwin obtained a bachelor's degree in 1986 and a master's degree in personnel and labor relations in 1989. At the time of Goodwin's promotion to representative, all three of the other representatives were white, and only one had a master's degree. Each of the four representatives had been a salaried employee of General Motors since the 1970s and had held a variety of positions, including other supervisory positions, before becoming a representative. Goodwin's supervisor Charles Limon testified that all four of the

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[3] General Motors uses job levels to designate the salary ranges available to employees in particular positions.

[4] For a period of time from April 1992 until December 1993, Goodwin -- along with another one of the representatives - - was returned to a fifth-level position, without any decrease in salary, due to a reduction in force at the Fairfax plant.

representatives had different strengths and weaknesses and that none of them stood "head and shoulders" above the rest.

When she was promoted to representative, Goodwin's salary was set at more than $300 per month lower than the lowest paid of the other representatives and more than $500 less than the highest paid. Over the years that salary disparity grew larger (principally due to straight percentage increases), until in 1997 Goodwin was being paid $547 less per month than the next lowest paid representative. During the same period of time the disparity among the rates of pay of the other three representatives shrank from over $200 per month to only $82 per month.

Pay ranges for salaried employees in General Motors plants are established by company headquarters in Detroit. Aside from those market ranges, there are no set rates for employees entering specific positions. Salaries are not dictated by an employee's seniority with the company or in a particular position, and subjective factors can come into play as managers and personnel officers determine the levels of compensation for salaried employees.

General Motors also maintains a confidentiality policy regarding salaried employees' earnings, so that Goodwin did not know about--and had no way of discovering--the salary disparity between herself and the other representatives. In about April 1996 Goodwin did express concerns about her compensation level to the personnel director after hearing a rumor that a white clerk in a fifth-level position was earning more than she was. Goodwin was assured that her salary was higher than the clerk's.

When she asked if her raises could be increased to bring her salary closer to what she believed to be the market range for her position, she was told that no funds were available for such an adjustment.

In March 1998 a printout listing the 1997 salaries of each of the four representatives somehow appeared on Goodwin's desk and on the desks of some co-workers.[5] Goodwin immediately sought an explanation from management as to the disparity the printout revealed. In June 1998 General Motors offered Goodwin an annual raise of 5% -- but because she refused to sign a contemporaneous document acknowledging that she had received all of the compensation due her, she never received that increase. Two months later Goodwin was offered an additional raise that would have kept her salary $259 less than the next than the next lowest paid representative, and she declined that as well. Nor did Goodwin receive a 1999 annual raise, also due to her continuing refusal to sign the acknowledgment.

On September 22, 1998 Goodwin filed a charge of employment discrimination with EEOC. After she received a right to sue letter, she timely filed suit in the District of Kansas. Upon completion of discovery General Motors filed its motion for summary judgment. As stated earlier, this is the appeal from the granting of that motion and the consequent dismissal of the case.

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[5] Neither party has provided an explanation of how that printout came to be placed on Goodwin's desk or by whom, but there is no dispute as to the accuracy of the information it contained.

STATUTE OF LIMITATIONS

Under Title VII a plaintiff must file an administrative charge with EEOC within 300 days after the alleged act of discrimination (*Martin v. Nannie & the Newborns, Inc.*, 3 F.3d 1410, 1414 (10th Cir. 1993)). Here the district court ruled that with the exception of the raise Goodwin was offered in 1998, any claims related to her pay rate were barred as having occurred more than 300 days before she filed her EEOC charge. In so ruling the district court framed Goodwin's pay discrimination claim as a continuing effect of prior discrimination. That analysis was clearly in error.

Continuing effects of prior discrimination are generally not actionable under VII once the 300 day filing period has passed following the underlying discriminatory acts. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 52 L.3d.2d 571 (1977) held that an otherwise neutral system that merely perpetuates the effects of previous discrimination is not itself actionable under Title VII. In effect *Evans* precludes any plaintiff from recovering for any lingering effects of discrimination once the Title VII filing period has elapsed after the underlying discriminatory acts (see also *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258, 101 S. Ct. 498, 66 L.Ed.2d 431 (1980); *Lorance v. AT & T Techs., Inc.*, 490 U.S. 900, 908, 109 S. Ct. 2261, 104 L.Ed.2d 961 (1989)).

But *Bazemore v. Friday*, 478 U.S. 385, 395, 106 S.Ct. 3000, 92 L.3d.2d 315 (1986) has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a

lingering effect of past discrimination -- instead it is itself a continually recurring violation.[6] *Bazemore* addressed the question whether discriminatory pay rates that had been set before Title VII became applicable to state and local governments were actionable or nonactionable under Title VII as then amended to expand its coverage (*id.*). In answering that question in the affirmative, *Bazemore* articulated what remains the basic rule as to pay discrimination claims (*id.*):

> Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII.

Under *Bazemore*, then, pay discrimination must be viewed as a continually recurring series of violations, each of which is separately actionable under Title VII.

While the circuit has had no previous occasion to consider and apply that rule, other circuits have uniformly recognized that under *Bazemore* "a claim of discriminatory

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[6] *Bazemore* begins with a brief two-page per curiam opinion (*id.* at 386-88, 106 S.Ct. 3000). What then follows is an extended concurring-in- part opinion authored by Justice Brennan and joined by *all* of the other Justices (*id.* at 388-407, 106 S.Ct. 3000). Two other opinions conclude the array: a separate concurrence by Justice White, written for himself and four other Justices (*id.* at 407-09, 106 S.Ct. 3000), and a dissenting-in-part opinion by Justice Brennan, written for himself and three other Justices (*id.* at 409-20, 106 S.Ct. 3000). Because what is treated in this opinion is drawn entirely from the first-mentioned Brennan opinion, it represents a unanimous decision of the Supreme Court.

pay is fundamentally unlike other claims of ongoing discriminatory treatment because it involves a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action" (*Pollis v. New School for Soc. Research*, 132 F.3d 115, 119 (2d Cir. 1997); accord, *Cardenas v. Massey*, 269 F.3d 251, 257 (3d Cir. 2001); *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (en banc); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 347 (4th Cir. 1994); *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 448-49 (11th Cir. 1993)). Today we join those circuits and the Supreme Court in recognizing that each rase-based discriminatory salary payment constitutes a fresh violation of Title VII.

General Motors argues that *Bazemore* is inapplicable here, but that argument is unpersuasive. Simply put, none of the cases cited by General Motors in any way supports the premise that *Bazemore* is irrelevant to Goodwin's pay discrimination claim.

Thus General Motors points to *Carter v. West Publ'g Co.*, 225 F.3d 1258 (11th Cir. 2000), but *Carter* did not involve a claim of pay discrimination. Instead it dealt with the lingering effects -- the nonreceipt of dividends -- of an employer's time-barred discriminatory act of failing to offer stock options to female employees (*id.* at 1265). As such, that claim fell under the *Evans* line of cases instead of *Bazemore*.

General Motors also urges us to adopt the different approach taken in *Dasgupta v. University of Wisconsin*, 121

F.3d 1138 (7th Cir. 1997). *Dasgupta* dealt with a complaint of national origin discrimination in which the plaintiff alleged several manifestations of discrimination: differences in pay and promotion as well as the employer's failure to protect him from harassment by other employees (*id.* at 1139). Each instance of harassment and failure to promote occurred years before plaintiff filed his claim, but he argued that those actions resulted in a continuing violation via a lower salary (*id.* at 1139-40).

In finding the plaintiff's claim barred by the filing period requirement, the Seventh Circuit analyzed the claim under the lingering effects framework and held that the plaintiff's lower salary did not itself create an independent cause of action (*id.* at 1140). Describing the line between *Dasgupta* and *Bazemore* as a "fine one, but reasonably distinct," the court said that unlike *Bazemore* "[t]his is not a case ... where the illegal act is repeated during the limitations period" (*id.*). In drawing that line the court did not advert to the unambiguous *Bazemore* holding that we have quoted, nor did it explain how--particularly in light of that holding -- Dasgupta's claim of discriminatory salary failed to constitute a recurring violation during the limitations period.

Finally, General Motors cites to the district court opinion in *Amro v. Boeing Co*, 65 F. Supp.2d 1170 (D. Kan. 1999), a decision that we affirmed at 232 F.3d 790 (10th Cir. 2000). While the district court there found *Dasgupta* persuasive (65 F. Supp.2d at 1184-85), it did so in a context in which the plaintiff attempted to avoid the preclusive effect of the holding in an earlier suit -- a ruling that his employer had not engaged in salary discrimination--

by arguing in plaintiff's second suit that his aggregate salary was discriminatory (*id.*). In affirming we made much the same point as the district court: Because it had previously been determined that the earlier salary decisions were not discriminatory, any ramifications that those decisions might have on the plaintiff's current salary were obviously not discriminatory either (232 F.3d at 798-99). That holding provides no support for General Motors' position here.

No other circuit has discerned the fine-line "distinction" perceived by the Seventh Circuit in *Dasgupta*, and we find any such approach unpersuasive here. Goodwin has shown that General Motors pays her less than her similarly-situated white co-workers. To further distinguish Goodwin's situation from that in *Dasgupta*, Goodwin had no way of knowing about that disparity (and hence about the assertedly race-based discrimination) until she received the salary information in 1998, at which time she promptly initiated this action.[7] Just as in *Bazemore*,

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[7] On this point the district court's analysis was particularly flawed. It found that Goodwin should have known of the need to file a complaint at the time she received each raise or promotion, for she knew (of course) what her actual salary was at those times. Just sentences later, though, the district court commented that notice of an adverse employment decision is required before the statute of limitations begins to run under Title VII. Here Goodwin indisputably had no notice that any of General Motors' salary decisions were adverse to her in terms of racial disparity until she received the salary printout in March 1998. It makes no sense to suggest that Goodwin should or even could have filed her complaint before she knew about any adverse decisions.

each paycheck that delivers less to Goodwin than to her co-workers constitutes grounds for a new claim under Title VII. We find that Goodwin's claim falls squarely within the pay discrimination framework articulated by *Bazemore*, and we therefore hold that her claim is not barred by the 300-day filing requirement in Title VII.

There is, however, a limitation on the relief that Goodwin may obtain should she succeed in proving her charge of discrimination at trial. Title VII permits the recovery of back pay for a period no longer than two years before the filing of the charge of discrimination. As the en banc Eighth Circuit explained in *Ashley*, 66 F.3d at 168:

> Relief back to the beginning of the limitations period strikes a reasonable balance between permitting redress of an ongoing wrong and imposing liability for conduct long past.

We agree with that analysis. Title VII's two-year limitation, which cuts off any claim for the period preceding September 22, 1996, applies to any damages that Goodwin may prove at trial.

EVIDENCE OF DISCRIMINATION

We now turn to Goodwin's substantive claim. At this summary judgment stage she may show[8] discrimination

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[8] Of course Goodwin need not "show" or "prove" or "establish" anything to defeat General Motors' summary judgment motion. Instead she must merely demonstrate the existence of a genuine issue of material (that is, outcome-determinative) fact. Although this opinion will nonetheless often employ one of the quoted terms because that terminology

either directly (through direct or circumstantial evidence or both) or via the indirect *McDonnell Douglas* burden-shifting method (*Elmore v. Capstan, Inc.*, 58 F.3d 525, 529 (10th Cir. 1995)). With Goodwin having proffered no direct evidence of discrimination, we must analyze her claims under the *McDonnell Douglas* ping-pong formulation. First Goodwin must establish a prima facie case of discrimination (*id.*). If she does so, General Motors must articulate a legitimate nondiscriminatory reason for its decision (*id.* at 530). If General Motors meets that burden (of production, not persuasion), Goodwin must prove that the decision was actually the result of intentional discrimination, either by producing evidence of discriminatory motive or intent or by showing that the articulated reason is pretextual (*id.*).

Goodwin may demonstrate a prima facie case of racial discrimination in a number of ways, including a showing that (1) she is a member of a racial minority, (2) her job performance was satisfactory, (3) she was adversely affected by General Motors' employment decisions and (4) similarly situated non-minority employees were treated differently from her (see the discussion in *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 & nn. 6-7 (10th Cir. 2000)). That is not an onerous burden (*Ortiz v. Norton*, 254 F.3d 889, 895 (10th Cir. 2001)). And here General Motors has disputed only the fourth element--that similarly situated non-minority employees were treated differently.

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is often used by the cited cases, we have consistently imposed that lesser burden on Goodwin in testing her position.

In analyzing that issue the district court limited its consideration to the raise that Goodwin received in 1998, reasoning that it was the only salary decision that fell within the period of the statute of limitations. Its limited consideration produced two findings: (1) that Goodwin was similarly situated to the other three representatives[9] and (2) that she was not treated differently because the *percentage* raise that she was offered was equal to or greater than the *percentage* increases given to her co-workers that year. Both by using a percentage approach rather than the absolute numbers involved[10] and by limiting its analysis to

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[9] General Motors has not challenged this finding on appeal, and it is well-supported by the evidence. All four representatives had the same supervisor, performed identical job duties and were subject to the same company standards and policies. In addition, each was a long-term General Motors employee who had held a variety of company positions, including prior supervisory jobs, before being promoted to the position of representative. And Goodwin was one of just two who had master's degrees.

[10] By definition the application of an identical percentage increase to already unequal amounts increases the dollar difference between them. Because the key showing of discrimination lies in the salary differential between Goodwin and the other representatives, a differential that was maintained--and indeed expanded--by General Motors' practice of granting equal or similar percentage raises to the four employees, such use of an identical percentage increase does not excuse or avoid the discrimination shown by the disparity-in-dollars end result.

that singe raise instead of considering Goodwin's full salary history, the district court erred.

While as noted earlier Goodwin may recover damages only for Title VII's two-year statutory period, that limitation on recovery does not at all preclude her from introducing the "quite probative" evidence of earlier acts of discrimination to support a claim of current discriminatory intent (*Bazemore*, 478 U.S. at 402 n. 13, 106 S.Ct. 3000; accord, *Pitre v. Western Elec. Co.*, 843 F.2d 1262, 1267 (10th Cir. 1988)). Goodwin may therefore adduce evidence of disparate salary payments throughout her tenure as a representative.

Goodwin's evidence that her starting salary as a representative was between $300 and $500 less than that of her co-workers and that the disparity actually increased as she remained in that position--while the disparity among the other representatives shrank--is certainly adequate to establish that she was treated differently from her similarly-situated non-minority co-workers. Hence Goodwin has demonstrated a prima facie case of discrimination.

Under the next *McDonnell Douglas* step, General Motors must articulate a legitimate nondiscriminatory reason for its salary decisions. General Motors has met that "exceedingly light" burden (*Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1363 (10th Cir. 1997)) by asserting that Goodwin's salary is simply the natural outcome of her unique employment path. In particular, General Motors points out that unlike the other representatives Goodwin began her career at Leeds instead of Fairfax and suffered salary and grade level demotions as a result of lay-offs.

General Motors has also argued that it simply could not afford to raise Goodwin's salary to pay her as much as the other representatives.

In response, Goodwin must demonstrate that those reasons are pretextual (*Randle v. City of Aurora*, 69 F.3d 441, 452 (10th Cir. 1995)). One way for her to do that is to provide evidence that General Motors' reasons are not worthy of belief (*id*; *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1177 (10th Cir. 2001)).

Goodwin has more than demonstrated a material factual issue on that score. General Motors' claim that her lower salary resulted in part from her initial employment at the Leeds plant flatly contradicts the explanation that it gave Goodwin when she was first hired at the Fairfax plant--that Leeds paid its employees more than Fairfax. Similarly, the evidence demonstrates that Goodwin's overall employment path with General Motors is not significantly different from that of the other representatives: All had lengthy careers with General Motors that included significant supervisory experience. When that is combined with Goodwin's education level, which was equal to or greater than that of her co-workers, it cannot be said as a matter of law that Goodwin's employment history justified the pay disparity, let alone its ever-increasing gap.

Finally, the suggestion that General Motors lacked the resources to pay Goodwin a higher salary may clearly be viewed as pretextual in light of the company's policy of setting salary ranges according to market rates, as well as its offer to increase her salary when she confronted them

with the evidence of the pay disparity. Goodwin has presented ample evidence under the *McDonnell Douglas* burden-shifting method to raise genuine issues of material fact as to General Motors' motives in setting, and keeping, her salary well below that of her similarly-situated non-minority co-workers.

CONCLUSION

In sum, we conclude that Goodwin has succeeded in demonstrating the existence of genuine issues of material fact on her claim of race-based pay discrimination and that the district court erred in granting General Motors judgment as a matter of law. We REVERSE the district court's dismissal of Goodwin's claim and we REMAND this case for trial.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PAMELA R. GOODWIN,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	
v.	)	No. 99-2241-CM
	)	
GENERAL MOTORS CORPORATION,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

This matter is presently before the court on the defendant's, General Motors Corporation, motion for summary judgment (Doc. 28) and the plaintiff's, Pamela Goodwin, motion to supplement (Doc. 39) her response to defendant's summary judgment motion. In the interests of justice, the court grants the plaintiff's motion to supplement and considers the supplemental memorandum in deciding the defendant's motion for summary judgment. For the reasons set out herein the defendant's motion for summary judgment is granted.

I. MOTION TO SUPPLEMENT

The summary judgment motion at issue here has a tortuous history. Defendant filed the motion on June 30, 2000 and plaintiff did not respond within the time allowed by local rule. After asking the court to grant the summary judgment motion as unopposed, the defendant discovered that it had served the motion on plaintiff's attorney by first class mail to an incorrect address. The court held a telephone conference on September 6 and granted the plaintiff until October 10 to respond to the motion. Plaintiff filed her response at 11:44 p.m. on October 10. On October 20, before the defendant replied to plaintiff's response, plaintiff filed a motion to supplement along with a Supplemental Memorandum in Opposition to Defendant General Motors Corporation Motion for Summary Judgment. On October 23, defendant filed a reply memorandum in support of its summary judgment motion, but has responded neither to plaintiff's motion to supplement nor to plaintiff's supplemental memorandum.[1]

The court has discretion to permit supplemental briefing and, although it generally disfavors

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[1] In a footnote to its reply memorandum, the defendant states its opposition to plaintiff's motion to supplement and requests ten days to respond to the plaintiff's supplemental memorandum if the court allows the supplementation. (Def.'s Reply Mem., n.1). Making a request in a footnote in a brief is insufficient to seek affirmative action by the court. *Dewey v. Topeka*, No. 97-4037-SAC, 2000 WL 1542885, at *2 (D. Kan. Sep. 19, 2000) (citing Fed. R. Civ. P. 7 and D. Kan. Rule 7).

supplementation, it will occasionally consider it. *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 655, 659 (D. Kan. 1999); compare *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456, 457 (D. Kan. 1999) (request for sanctions inappropriate in supplement to a motion filed months earlier). The court may grant an uncontested motion without further notice. D. Kan. Rule 7.4.

Plaintiff's memorandum, filed on October 10, did not include exhibits which were cited in the memorandum. Plaintiff's statement of uncontroverted facts in the October 10 memorandum did not cite with particularity to the record as required by D. Kan. Rule 56.1. Plaintiff's supplemental memorandum corrects those deficiencies. Plaintiff argues that the supplemental memorandum "does not materially alter Plaintiff's initial response to the summary judgment." (Pl.'s Mot. to Supplement at 1). Although the supplemental memorandum does not set out any new legal theories, the court notes that it provides twelve additional numbered paragraphs of allegedly uncontroverted facts and approximately four pages of additional argument. In the interests of justice, however, the court finds that it would unfairly prejudice the plaintiff if the court were to deny her request to supplement her response. Where the plaintiff has corrected procedural deficiencies before the defendant replied to the memorandum, the court should not use the rules of procedure to prevent a decision on the merits of the motion, since the defendant has not been prejudiced thereby. Therefore, the plaintiff's motion to supplement is granted and the court will consider the plaintiff's

supplemental response in opposition to defendant's motion for summary judgment.

II. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Id.* (citing *Anderson*, 477 U.S. at 248).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Id.* at 670-71. In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Id.* at 671 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256; *see also Adler*, 144 F.3d at 671 n.1 (concerning shifting burdens on summary judgment). The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256. Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Adler*, 144 F.3d at 671. "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.*

Finally, the court notes that summary judgment is not a "disfavored procedural shortcut," rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

III. FACTS

The facts are largely uncontroverted. Plaintiff does not specifically controvert any of the defendant's facts, but restates them in her own words and adds additional facts in her supplemental memorandum. The court views the facts, as it must, in the light most favorable to the plaintiff. The plaintiff, an African-American woman, began working for General Motors Corp. (GM) at its Leeds plant in Kansas City, Missouri (Leeds) in 1976. In 1978 the plaintiff was promoted to supervisor of janitors, a salaried sixth-level position. Plaintiff was laid off in June 1980, and recalled

in August 1980 as a fourth-level clerk with an 11% reduction from her previous pay.

In September 1982 plaintiff was laid off again. Plaintiff was recalled in March 1983 as a fourth-level clerk. While in this position, plaintiff performed duties of a company car coordinator. Company car coordinator is a sixth-level position at other GM plants, but plaintiff was employed and payed as a fourth-level clerk while performing those duties. While performing those duties, plaintiff was denied a promotion. GM told the plaintiff that her promotion was denied because no employees at Leeds were being promoted since the Leeds plant was being closed. In August 1987 the Leeds plant closed and plaintiff was once again laid off.

In October 1987, plaintiff transferred to a temporary position as a plant security officer at the GM Fairfax plant at Kansas City, Kansas (Fairfax). While plaintiff was working as a plant security officer, GM offered her a permanent fifth-level position as a labor relations clerk at the Fairfax plant. Plaintiff accepted the position, but she was placed as a temporary fourth-level clerk with pay lower than she had been receiving as a fourth-level clerk at Leeds. GM explained the pay reduction by telling plaintiff that Fairfax did not pay fourth-level employees as much as Leeds. In June 1988, after plaintiff had decided to take a permanent position with GM at Flint, Michigan, plaintiff's fourth-level position was made a permanent position, and plaintiff stayed at Fairfax. Approximately a year later, plaintiff was promoted to a fifth-level labor relations clerk.

In December 1991 plaintiff was promoted to a sixth-level labor relations representative position and, within a month, given a raise to $3,360 per month. At the time plaintiff was promoted to labor relations representative, other labor relations representatives at Fairfax received the following monthly salaries: S.B., $3,721; R.W., $3,893; C.H. $3,681.[2] GM eliminated the second shift at Fairfax in April 1992 and plaintiff was placed in a fifth-level clerk position, without any loss in pay. At the same time, C.H. was placed in a fifth-level position from a sixth level position, also without any loss in pay. In December 1993, plaintiff and C.H. were both recalled to sixth-level positions as labor relations representatives. Plaintiff and the three co-workers she asserts are similarly situated received pay raises after May 1994 as follows:

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[2] Plaintiff's memorandum compares pay received in December 1988. (Pl.'s Supp. Mem., at 5, ¶ 22). However, in December 1988 plaintiff was a fourth-level clerk-not a labor relations representative, but was in a sixth-level position, had been a labor relations representative between April 1985 and April 1988, and was recalled as a labor relations representative in December 1993 along with the plaintiff. (Pl.'s Supp. Mem., Ex. A, D).

Individual	1993 Pay	1994 Pay	% Increase	1995 Pay	% Increase	1996 Pay	% Increase	1997 Pay	% Increase	1998 Pay (Tendered)	% Increase
Plaintiff	$3360	$3528	5.0	$3762	6.6	$3962	5.3	$4082	3.0	$4286	5.0
S.B.	$3896	$4166	6.9	$4356	4.6	$4531	4.0	$4711	4.0	$4921	4.5
R.W.	$4023	$4163	3.5	$4313	3.6	$4513	4.6	$4703	4.2	$4893	4.0
C.H.	$3681	$3905	6.1	$4169	6.8	$4444	6.6	$4629	4.2	$4859	5.0

At all times relevant to this case, the plaintiff was paid the least of the four labor relations representatives. The relative rank order for the percentage of raise given to each of the four co-workers each year can be summarized as follows:[3]

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[3] Where two employees are given the same percentage raise, the table shows the same rank order for each employee.

Individual	1994 Raise	1995 Raise	1996 Raise	1997 Raise	1998 Raise
Plaintiff	$3360	$3528	5.0	$3762	6.6
S.B.	$3896	$4166	6.9	$4356	4.6
R.W.	$4023	$4163	3.5	$4313	3.6
C.H.	$3681	$3905	6.1	$4169	6.8

On at least two occasions between 1992 and 1997, plaintiff complained to defendant about her compensation. At one point, plaintiff complained to the general supervisor of the labor relations department that her compensation was not commensurate with the "market range" for her position and asked if the amount of her raises could be increased. The supervisor explained that "the pie is only so big," and GM could not increase her raises at that time. In approximately April 1996, plaintiff approached the plant personnel director regarding her compensation. Plaintiff had heard that a white clerk at the plant was receiving a salary higher than hers. The personnel director told the plaintiff that her compensation was, in fact, higher than the white clerk's. Plaintiff also expressed concern to the personnel director that her salary was below "market range." The personnel director explained that "the market is going in a different direction" and "the objective is to keep pay scales below market range."

GM employees are prohibited from discussing compensation levels with other employees, but in March 1998 plaintiff discovered a December 1997 salary report which contained a list of the 1997 salaries of all employees in the personnel department, including the plaintiff and the three co-workers plaintiff alleges are similarly situated. From that report plaintiff determined that she was the lowest paid labor relations representative at Fairfax. Plaintiff discussed the report and her level of compensation with the plant's salaried personnel administrator, the plant personnel director, the general supervisor of the labor relations department, and her direct supervisor.

In June 1998, GM tendered plaintiff a five percent raise, to $4286, when it made annual raises, but the plaintiff refused to sign a confidentiality/compensation statement. As a result, plaintiff was not given the raise. Since then, plaintiff has refused to sign any confidentiality/compensation statement and has received no raises. Shortly after the regular June 1998 raise, the Fairfax plant manager and plant personnel director offered the plaintiff an additional raise to $4,600 per month. In August 1998 plaintiff refused the raise because it did not address past disparities in her compensation and would still result in her being paid $259 less per month than the lowest paid of her co-workers. In June 1999 GM tendered a raise to $4,900 per month, and once again plaintiff refused to sign the confidentiality/compensation statement.

Plaintiff's direct supervisor testified that the plaintiff is a very capable person who does her job well and performs equivalently to her co-workers. (Pl.'s Supp. Mem., Limon Depos., p.12, 1.10 - p.13, 1.1; p.22, 1.5 - p.23,1.10). The plaintiff believes that the disparity between her compensation and that of her co-workers is the fault of the former salaried personnel administrator, the former plant personnel director, and the former general supervisor of the labor relations department. However, plaintiff does not recall any specific discriminatory acts or statements by any of the three individuals. (Pl.'s Supp. Mem., at 12, ¶ 48).

IV. STATUTE OF LIMITATIONS

A. Limitations Period

Plaintiff complains pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2,[4] that the defendant discriminated against her by (1) paying her less than similarly situated white co-workers and (2) forcing her to accept pay decreases when she was recalled from lay-off in 1980 at Leeds and again, after the Leeds plant closed, when she was re-hired at Fairfax in 1987 or 1988. The court concludes that the plaintiff may also assert (3) claims of discriminatory annual raises after 1993.[5]

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[4] Plaintiff initially asserted claims pursuant to 42 U.S.C. § 1981 in addition to her Title VII claims. In her papers, the plaintiff has addressed only her Title VII claims and, accordingly, the court deems plaintiff's § 1981 claims abandoned and grants defendant's motion for summary judgment with respect to the § 1981 claims. *Wesley v. Don Stein Buick, Inc.*, 42 F. Supp. 2d 1192, 1995, n.2 (D. Kan. 1999) (claims deemed abandoned where pro se plaintiff failed to address claims in papers responding to summary judgment motion).

[5] Although the plaintiff specifically asserts a claim only for discriminatory salary level, she claims that GM was "paying her less than" other workers (First Am. Compl., at 4, 6) and "denying her raises which would put her in line with corporate policy." (Pretrial Order, at 3). Courts have recognized a claim for discriminatory raises where a claim for discriminatory salary is not cognizable. *Amro v. Boeing Co.*, 65 F. Supp. 2d 1170, 1185-86 (D. Kan. 1999). The defendant has argued that the raises given plaintiff support its position.

Because Kansas is a deferral state, an employee asserting a Title VII claim must file a charge with the EEOC within 300 days after the allegedly discriminatory act occurred. 42 U.S.C. § 2000e; *Mascheroni v. Board of Regents*, 28 F.3d 1554, 1557 n.3 (10th Cir. 1994; *Tilmon v. Dillard's Dep't Stores*, 58 F. Supp. 2d 1276, 1281 (D. Kan. 1999). An administrative complaint is a prerequisite to suit pursuant to Title VII. *Delmar v. Raytheon Aircraft Corp.*, No. 96-1002-JTM, 1996 WL 499144, at *4 (D. Kan. Aug. 9, 1996). Plaintiff filed a charge of discrimination with the EEOC on September 22, 1998. Therefore, any acts occurring before November 26, 1997 are outside the Title VII limitations period and may not be considered by this court unless some reason appears to toll the limitations period.

B. Continuing Violation Doctrine.

Acts occurring before the Title VII statutory period may be considered by the court if they are sufficiently related to at least one allegedly discriminatory act occurring within the period and if all the acts constitute a continuing pattern of discrimination. *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1310 (10th Cir. 1999). The Tenth Circuit has described the relationship:

(Mem. for Summ. J. at 17-18; Reply Mem. at 3). The defendant has acknowledged the issue and will not be surprised or prejudiced if the court recognizes a discriminatory raise claim. Therefore, the court concludes that the plaintiff may assert such a claim.

> The continuing violation doctrine allows a Title VIII plaintiff to challenge conduct that occurred outside the statutory time period if such conduct was "sufficiently related and thereby constitute[d] a continuing pattern of discrimination." "Mere continuity of employment, without more, is insufficient...." Although the act occurring within the statutory period need not violate Title VII when viewed alone, the plaintiff **cannot merely allege the continuing effects of prior acts**; rather, she must show that events inside and outside the statutory period share commonality and are related acts of discrimination. In determining whether a plaintiff has made such a showing, we consider: "(i) subject matter--whether the violations constitute the same type of discrimination; (ii) frequency; and (iii) permanence--whether the nature of the violations should trigger an employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate."

Robbins v. Jefferson County Sch. Dist., 186 F.3d 1253, 1257-58 (10th Cir. 1999) (citations omitted) (emphasis added).

The premise of the continuing violation doctrine is the equitable notion that a statute of limitations should not begin to run until a reasonable person would, or should, be aware that her rights were violated. Therefore, a continuing violation is not likely to be found where a plaintiff knew, or should have known through the exercise

of reasonable diligence, that she was being discriminated against. *Bullington*, 186 F.3d at 1311; *Holmes v. Regents of the Univ. of Colo.*, No. 98-1172, 1999 WL 285826, at *4 (10th Cir. May 7, 1999).

There are five circumstances upon which the plaintiff bases her claim of race discrimination. (1) Pay reductions--upon recall from lay-off in August 1980 and upon hiring at Fairfax in 1987 or 1988; (2) "undercompensation" and failure to promote upon recall from lay-off in March 1983 at Leeds; (3) grade level upon hiring at Fairfax in 1987 or 1988; (4) aggregate pay level below other labor relations representatives upon promotion as a labor relations representative in 1991 or 1992 and continuing for all periods relevant to this suit; and (5) pay raises given or tendered from 1994 through 1998. The court will first analyze plaintiff's claim of a continuing violation based upon the circumstances that did not continue in identical form after November 1997.

1. Discriminatory Acts Not Continuing After November 1997

The court finds no continuing violation based upon the totality of the circumstances. The "acts" which continued into the limitations period are (a) aggregate pay below the level of other labor relations representatives after November 1997, and (b) the raise tendered in June 1998. The fact that all of the alleged discriminatory acts occurring within and outside the limitations period concern compensation is not sufficient to constitute the same subject matter. The pay reductions in 1980 and 1987 or 1988 are not the same subject matter as the acts occurring within the limitations

period. The acts occurring in the limitations period do not involve circumstances in which the work force was reduced or the plant was closed, they deal with decisions on apportioning raises to employees, not with deciding which employees to return from a reduction in force or to hire from a nearby closed plant.

Furthermore, the pay reductions are not acts which occurred frequently beginning in 1980 and continuing into the limitations period. Two pay reductions occurring seven years apart (and where the last one occurred ten years before any charge was filed) are too distant in time to be viewed as frequent occurrences. Finally, the pay reductions were "permanent" for Title VII purposes when they occurred. The consequences of the pay reductions would continue even if the defendant had no continuing intent to discriminate. Further, a reasonable person would know that the time to act was immediately after her pay was reduced. The pay reductions at issue are not part of a course of conduct which continued into the limitations period.

The "undercompensation" and failure to promote at Leeds after March 1983 cannot be considered part of a continuing course of conduct to pay the plaintiff less than similarly situated co-workers. The subject matter of the discriminatory pay at Leeds was to pay the plaintiff at a rate for a **position lower** than the duties she actually performed (a fourth level employee performing job duties normally performed by a sixth-level company car coordinator). Plaintiff does not allege that she was paid less than other fourth-level co-workers at Leeds. At Fairfax, the plaintiff is paid less than **co-workers of the same grade** and job title working in the same office.

Although plaintiff alleges that her underpayment has continued to the present, the underpayment cannot be considered frequent because there is no evidence that GM has made frequent, conscious, intentional decision to underpay the plaintiff. At most, plaintiff can argue that a decision to under pay the plaintiff was made annually when GM considered raises.

Plaintiff does not present any facts to indicate that GM considered her salary in relation to the salary of her co-workers in order to determine her raise.[6] The facts indicate that aggregate salary is used to determine how the employee's compensation compares to the market range for that position (Pl.'s Supp. Mem. at 5-6, 10, ¶¶ 26, 41, 42) and as a base salary upon which to apply a percentage raise. Most importantly, any decisions made by the Leeds plant were permanent when the plant closed and the plaintiff was laid off. At that point, the discrimination was complete. A reasonable person would know that any discrimination which occurred at Leeds was complete.

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[6] Plaintiff states that a GM supervisor compares level of compensation between employees in deciding annual raises. (Pl.'s Supp. Mem., Statement of Uncontroverted Facts, at 7, ¶ 30). The testimony to which the plaintiff cites for that fact, in context, indicates only that a supervisor **might** compare compensation levels, and would have **discretion** to do so. The testimony does not indicate that a supervisor does or is expected to compare compensation levels in deciding raises. (Pl.'s Supp. Mem., Marr Depos., p. 73, l. 25 - p. 75, l. 6). Plaintiff cites to no evidence that any supervisor actually compared her compensation to that of her co-workers in deciding what raise to give her.

The decision by GM to hire plaintiff as a fourth-level rather than a fifth-level employee and reduce her pay upon hiring at the Fairfax plant is not part of a continuing course of discriminatory conduct to suppress plaintiff's pay. The subject matter of that decision was whether to hire an employee who had previously been a GM employee at another facility, what position or positions were available for which she was qualified, and at what level should she be hired. The decision was a one-time decision made at the latest in June 1988 when plaintiff's position was changed from temporary to permanent. Plaintiff does not allege that GM has frequently decided to offer positions to plaintiff and reduce the level of the position after she has accepted. Once the decision was made, it was permanent. The effects of the decision would continue for all the time plaintiff was employed at Fairfax even if there were no continuing intent to discriminate by any of the company decision-makers. At the point at which the position level was reduced and pay was decreased, a reasonable person would have known that it was necessary to assert her rights.

The court finds no basis to apply the continuing violation doctrine to consider the earlier acts of discrimination. The court will next consider the continuing violation doctrine in light of circumstances which existed before November 1997 and continued into the limitations period.

2. "Identical" Discriminatory Acts Occurring Before and After November 1997

Plaintiff argues that GM discriminated against her on account of her race when it gave her a salary below that of her co-workers in January 1992 after it had promoted her as a sixth-level labor relations representative. Plaintiff argues there is a continuing violation because, after November 1997, GM once again discriminated against her on account of her race by making the decision to continue to pay her at a salary below that of her co-workers. Alternatively, the plaintiff claims that she has been given discriminatory raises each year beginning in 1994, that the raise tendered and refused in June 1998 was a discriminatory raise, and that, therefore, GM has engaged in a continuing pattern of discriminatory conduct justifying the court in considering the prior acts of discrimination.

The court assumes for summary judgment purposes that GM's salary decision in January 1992 was unlawful discrimination. Nevertheless, the mere fact that plaintiff's salary remains below that of her co-workers does not constitute a continuing violation. As discussed above, plaintiff provides no evidence that GM ever compared the aggregate level of her salary to that of her co-workers. This case illustrates the wisdom of considering the "permanence" factor before the court may apply the continuing violation doctrine. Based upon the facts presented and assumed by the court, the consequences of GM's discriminatory decision to start plaintiff at a lower salary will continue throughout her career at GM even if no further discrimination or intent to discriminate continues.

Plaintiff knew of her salary in January 1992 immediately after she received the promotion. Although plaintiff's suspicion that race was a factor in setting her salary was not aroused until later, the discrimination was complete. GM is not required to notify plaintiff that it discriminated against her before the statute begins to run. *Tilmon*, 58 F. Supp. 2d at 1283 ("[a] declaration of discrimination need not be issued before the statute of limitations begins to run.") (quoting *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 558 (10th Cir. 1994)). Notice of the adverse employment action is all that is required. Plaintiff argues that GM's policy prohibiting employees from discussing salary prohibited her from knowing that discrimination had occurred. That argument may provide the basis for equitable tolling of the statute of limitations and will be considered later in this opinion.

Plaintiff has shown no actual, frequent, decisions to pay her less than her co-workers. Furthermore, the adverse employment action was permanent in January 1992. A salary below plaintiff's co-workers is no basis to justify application of the continuing violation doctrine. Plaintiff appears to argue that a difference in salary levels during the limitations period is actionable as race discrimination under Title VII so long as the defendant did not take action to correct the disparity, even though the decision to provide plaintiff a lower salary was made outside the limitations period.

Plaintiff's argument is precluded by Tenth Circuit law on continuing violation. The continuing effects of prior acts of discrimination are not actionable. *Robbins*, 186 F.3d at 1257-58; *Holmes*, 1999 WL 285826, at *4. As

discussed above, the discriminatory decision to pay plaintiff a salary lower than her co-workers was permanent and complete in January 1992. A court in this district has previously considered and rejected the argument that a claim for discriminatory aggregate salary disparity may be brought at any time. *Amro v. Boeing Co.*, 65 F. Supp. 2d 1170, 1184-85 (D. Kan. 1999) (citing *Dasgupta v. Univ. of Wis. Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997)). In *Dasgupta*, the court concluded that aggregate salary based upon decisions made outside the limitations period was not actionable because it was merely the lingering effect of previous unlawful acts. *Dasgupta*, 121 F.3d at 1140. The court in *Amro* agreed, but determined that annual raises are actionable under Title VII. *Amro*, 65 F.Supp. 2d at 1185-86. Accordingly, the court concludes that the disparity between plaintiff's aggregate salary and that of her co-workers is merely the lingering effect of prior discrimination.

Finally, plaintiff's claim that the annual pay raises constitute a continuing course of discriminatory conduct will not justify application of the continuing violation doctrine. Each pay raise constitutes the same subject matter. However, plaintiff does not present evidence to show that her aggregate salary level was ever compared to that of her co-workers in determining her raises.

In the circumstances of this case, frequency is not determinative of a continuing violation. The potentially discriminatory raises occurred at regular intervals in June of each year, and might in the proper circumstances support an inference of a continuing violation. *Compare Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 801 (11th Cir. 1988)

(two identical incidents, although three years apart, may constitute a continuing violation).

Each year GM gave the plaintiff a raise about which the plaintiff knew all of the facts immediately. If the raise was an adverse employment action which constituted discrimination because of the plaintiff's race, the discrimination was complete and the plaintiff was on notice of the need to assert her rights. As discussed above, the defendant is not required to notify the plaintiff that discrimination has occurred before the limitations period may run. Viewing each raise individually, the consequences of the discriminatory act would continue even in the absence of a continuing intent to discriminate. *Robbins*, 186 F.3d at 1258. Plaintiff may not wait beyond the limitations period to see if the defendant will discriminate again and invoke the continuing violation doctrine to seek redress for violations which occurred outside the limitations period.

The court finds that the continuing violation doctrine is not applicable in the circumstances of this case. However, plaintiff argues in the alternative that her "cause of action did not accrue until 1998 when she discovered that she was discriminated against due to pay." (Pl.'s Supp. Mem., at 21).

C. EQUITABLE TOLLING.

Plaintiff argues that the limitations period should be equitably tolled because GM's compensation confidentiality agreements prevented her from discovering the adverse employment action. Plaintiff reasons that she was unaware that her compensation was below that of her co-workers,

that she was without notice of any adverse employment action until she discovered the salary report in March 1998 and that, therefore, the limitations period should be equitably tolled.

The Tenth Circuit has determined that a Title VII "time limit will be tolled only upon a showing of active deception where, for example, the plaintiff has been actively misled or lulled into inaction by her past employer, state or federal agencies, or the courts." *Simons v. Southwest Petro-Chem, Inc.*, 28 F.3d 1029, 1031 (10th Cir. 1994) (citations and internal quotation marks omitted); *compare Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 616 (10th Cir. 1988) (tolling permitted only if plaintiff is actively misled or prevented from asserting her rights in some extraordinary way). To justify equitable tolling, the plaintiff must show that her failure to timely file was the result of "either a deliberate design by the employer or actions that the employer should unmistakably have understood would cause the employee to delay filing [her] charge." *Hulsey*, 43 F.3d at 557 (internal quotation marks omitted).

The circumstances of this case do not rise to the level of active deception required for equitable tolling. Plaintiff presents no evidence that GM's policy was part of a deliberate design to hide discrimination until after the limitations period. Many companies have a policy that employees may not discuss compensation and that the company will not reveal salaries. Those policies minimize conflict and promote harmony in the workplace. Plaintiff fails to present evidence that GM should have understood its policy would cause plaintiff to delay filing her EEOC charge.

Furthermore, plaintiff's statement of facts indicates that she suspected her salary was below market range for her position and was even below that of a **white clerk** as early as April 1996. (Pl.'s Supp. Mem., at 10, ¶¶ 41, 42). As the court previously noted, the defendant is not required to notify the plaintiff that it has discriminated against her before the limitations period will run. Even assuming the defendant's explanations for the plaintiff's salary and the policy on discussions about compensation were intended to mislead the plaintiff into inaction, the plaintiff suspected race discrimination was the reason for her low salary and knew that GM denied any problem in 1996, at least two years before she filed a charge with the EEOC. *See Purrington v. Univ. of Utah*, 996 F.2d 1025, 1030-31 (10th Cir. 1993) (equitable tolling is not applicable where plaintiff knowingly failed to act with due diligence and knew employer had not adequately addressed the issue).

Finding no continuing violation and no equitable tolling of the limitations period, this court has no basis to consider any allegations of discriminatory conduct occurring before November 26, 1997. The plaintiff, however, claims that the raise tendered in June 1998 was based upon race discrimination. Because the raise was tendered within the limitations period, the court must consider whether summary judgement for the defendant is proper on that claim.

V. RACE DISCRIMINATION IN 1998 PAY RAISE

A. Legal Standard Controlling Race Discrimination Claims

Title VII prohibits an employer from discriminating against an employee because of the employee's race. 42 U.S.C. § 2000e-2(b). In order to prevail on a race discrimination claim, the plaintiff must show that the defendant had a discriminatory intent or motive in its decisions concerning the plaintiff. *EEOC v. Flasher Co.*, 986 F.2d 1312, 1317 (10th Cir. 1992); *Wright v. Wanydotte County Sheriff's Dep't*, 963 F. Supp. 1029, 1035 (D. Kan. 1997). Plaintiff need not show that race was the sole motivation for the defendant's decisions, but only needs to establish that race was a factor which made a difference in the decision. *Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir. 1995). Since plaintiff presents no direct evidence of discrimination, the court must analyze the plaintiff's claims under the burden-shifting framework provided in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Elmore*, 58 F.3d at 529; *Flasher*, 986 F.2d at 1317; *Wright*, 963 F. Supp. at 1036.

Under the three-step *McDonnell Douglas* framework, the plaintiff must first establish a prima facie case of discrimination. *Elmore*, 58 F.3d at 529. If plaintiff is able to establish a prima facie case of discrimination, the defendant in step two must articulate a legitimate, nondiscriminatory reason for its decisions. *Id.* at 530. Once the defendant produces evidence of a legitimate, nondiscriminatory reason, then in step three the plaintiff is left to prove that the defendant's decision was the result of

intentional discrimination. *Id.* The plaintiff's burden in step three may be met by showing that the defendant's articulated nondiscriminatory reason is a pretext or cover-up for the real, discriminatory reason, or by direct or circumstantial evidence that the defendant had a discriminatory motive or intent in reaching its decisions. *Id.*

> To establish a prima facie case of race discrimination, plaintiff must show that: (1) she is a member of a racial minority; (2) her job performance was satisfactory; (3) she was adversely affected by defendant's employment decisions; and (4) similarly situated non-minority employees were treated differently.

Wright, 963 F. Supp. at 1036 (citing *Martin v. Nannie & the Newborns, Inc.*, 3 F.3d 1410, 1417 (10th Cir. 1993) and *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1260 (10th Cir. 1988)).[7]

B. ANALYSIS

1. Similarly Situated Employees

For purposes of summary judgment, the defendant has conceded that the plaintiff has satisfied the first three

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[7] Plaintiff asserts that "[t]o make out a prima facie case for racially motivated disparate pay . . . a minority plaintiff need merely to show that she occupies a job 'similar' to that of higher paid non-minorities." (Pl.'s Supp. Mem. at 16). The court already decided that the plaintiff's claim for racially motivated disparate pay is untimely. Therefore, the court need not decide whether plaintiff's assertion is correct.

elements of a prima facie case, but denies that plaintiff can show that she is similarly situated to the three co-workers she cites as comparable.[8] The court must determine whether the plaintiff has established that similarly situated employees were treated differently with regard to the June 1998 raise tendered by defendant. Employees are similarly situated if they deal with the same supervisor and are subject to the same performance evaluation and discipline standards. *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997). The court, in deciding whether employees are similarly situated, should consider **relevant** employment circumstances such as company policies applicable to the employees and whether their work history is comparable. *Id.*

Defendant argues that the plaintiff is not similarly situated to her co-workers because none of the co-workers has ever worked at Leeds, all of them have been in sixth-level positions longer than plaintiff, and none of them has ever been laid-off and forced to look for a position when a plant closed. If the plaintiff were able to assert her claim of discriminatory salary level, such considerations would certainly be relevant. However, the only claim properly before the court is plaintiff's claim of discriminatory pay raise in June 1998. Therefore, such considerations are **not relevant**. None of those considerations relate to criteria used by GM in determining raises--performance, critical

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[8] The court notes that the defendant's concession was directed toward claims of disparity in salary level and reduction in pay in 1980 and 1987 or 1988. The concession was not directed toward a claim of discriminatory raises.

skills, and position to mid-point. (Pl.'s Supp. Mem., at 5-6, ¶ 26).

Plaintiff and her co-workers all worked for the same supervisor in 1997 and 1998 and they were subject to the same standards for performance evaluation and the same company policies. There is evidence that the plaintiff and her co-workers performed their duties approximately equivalently. Therefore, the court finds that the co-workers chosen by the plaintiff as comparables were similarly situated to plaintiff for purposes of the 1998 raise at issue. However, that does not end the inquiry. The plaintiff must show that the similarly situated employees were treated differently than she in some discriminatory fashion.

Plaintiff has not met her burden under Title VII to show that, in the June 1998 pay raise, she was treated differently because of her race. In 1998, R.W. and S.B. each received a smaller percentage raise than plaintiff, and C.H. received exactly the same percentage raise as the plaintiff. No similarly situated non-minority employee was treated better than the plaintiff. Although S.B. and C.H. received a greater raise in terms of dollars per month ($210 and $230, respectively, versus $204 for the plaintiff), that is merely a continuing effect of the fact that the plaintiff's aggregate salary was less than her co-workers before the raise was given. The court finds as a matter of law that the plaintiff cannot establish a prima facie case of disparate treatment based upon the June 1998 pay raise tendered by the defendant and refused by the plaintiff.

The court finds that the plaintiff's Title VII claims based upon actions or decisions before November 26, 1997

are barred by the statute of limitations and may not be considered by this court. Furthermore, plaintiff has failed to establish a prima facie case of race discrimination pursuant to Title VII with respect to any actions or decisions within the limitations period. Therefore, summary judgment is proper with respect to all claims asserted by the plaintiff.

VI. ORDER

IT IS THEREFORE ORDERED that plaintiff's motion to supplement (Doc. 39) is granted.

IT IS FURTHER ORDERED that defendant's motion for summary judgment (Doc.28) is granted in its entirety. All of plaintiff's claims are dismissed with prejudice.

Dated this /28/ day of December 2000, at Kansas City, Kansas.

/s/ Carlos Murguia
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAY 9 2002
OFFICE OF THE CLERK

No. 01-1479

IN THE

Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

PAMELA R. GOODWIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to S. Ct. Rule 37.2, the Chamber of Commerce of the United States ("the Chamber") moves for leave to file a brief *amicus curiae* in support of Petitioner. That brief is attached. The Chamber is filing this motion because Respondent has refused to consent to the filing of this brief. In further support of this Motion, the Chamber states:

1. The Chamber is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members in important matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests, *inter alia*, by filing briefs in hundreds of cases of significance in this Court and in the courts of appeals.

2. This case involves the administration of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq*, to which the vast majority of the business that belong to the Chamber are subject. The decision below both exemplifies and exacerbates a profound division of authority in the courts of appeals on two questions regarding the application of Title VII's statute of limitations. These conflicts create confusion, uncertainty, and unnecessary litigation expense for both employers and employees alike.

3. The court below held that an aggrieved individual need not challenge a decision regarding his or her compensation within the limitations period specified in the statute — indeed is entitled to wait years or decades to challenge such an allegedly discriminatory decision — so

long as the economic consequences of that decision continue into the limitations period. This rule cannot be reconciled with the Court's decision in *United Air Lines v. Evans*, 431 U.S. 553 (1977), and it undermines the societal interest in repose that is reflected by Congress' choice of a brief limitations period for charges of discrimination. As the Court has previously observed, consistency and clarity in the law are uniquely important with regard to statutes of limitation. *Wilson v. Garcia*, 471 U.S. 261, 271 (1985). The law on this issue is in complete disarray and will not be clarified unless and until the Court agrees to do so.

4. The decision below also chooses sides in a three-way split of circuit authority regarding the remedial latitude of district courts in awarding back pay to successful Title VII plaintiffs. Some courts have held that a district court can award back pay for a period extending no further than the charge filing limitations period — at most 300 days prior to the date of the charge. Others hold that the district court can reach back as much as two years before the charge is filed. Still others will permit a two year award but only when a "continuing violation" has been shown. These doctrinal differences lead to vastly different awards for materially identical claims, depending on the geographic locale of the litigation.

5. These persisting conflicts on important matters of federal law are particularly problematic for Chamber members that do business in multiple states, and for those that do business in every state. More than anything else, the Chamber's members seek a single, clear, and reliable rule of law, applicable to all of its members and all of their employees. The Chamber asks for permission to participate so that it might explain to the Court the difficulties the rules adopted by the court below impose on its members.

Accordingly, the Chamber respectfully moves the Court to grant this Motion and allow the filing of the attached brief.

Respectfully submitted,

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INTERESTS OF THE *AMICUS CURIAE*

The interests of the Chamber of Commerce of the United States ("the Chamber") are fully described in the accompanying Motion for Leave to File Brief *Amicus Curiae*. In the interest of brevity, those matters will not be repeated here.[1]

STATEMENT

1. Respondent Pamela Goodwin was hired by Petitioner General Motors Corp. ("GM") in 1976. Pet. App. 22a. Her career at GM followed a fitful path of promotions, demotions, layoffs and recalls. She was promoted in 1978, laid off in 1980, and recalled to a job in a lower salary grade later that same year. *Id.* at 22a-23a. Goodwin was laid off again in 1982 and recalled in 1983. In the mid-1980s, she was denied a promotion because GM planned to close the plant where she worked. *Id.* at 23a. Goodwin was laid off when the plant closed in 1987. *Id.*

Goodwin transferred to a temporary position at a different GM facility later in 1987. *Id.* She obtained a full-time position shortly thereafter, and was promoted in 1989. *Id.* In 1991, GM promoted Goodwin to labor relations representative; at the time of this promotion, Goodwin earned less in the job than three other employees already working as labor relations representatives at the facility. *Id.* at 24a. Over the ensuing seven years, Goodwin received pay raises comparable to those received by her peers, but the differential remained. *Id.* at 14a n.10.

Goodwin filed a charge of race discrimination in 1998. *Id.* at 6a. In her charge, Goodwin challenged recall and promotion decisions occurring over an eighteen-year period. *None* of the promotion, demotion, compensation or recall decisions she challenged was made within Title VII's charge-filing limitations period. *Id.* at 29a, 32a. Goodwin subsequently filed suit in federal district court in the District of Kansas.

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1. Counsel for *amicus curiae* authored the brief in its entirety. No person or entity, other than the *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

2. The district court granted GM's motion for summary judgment, concluding that Goodwin's claims were time-barred. *Id.* at 41a, 45a. The district court found that Goodwin was challenging the "lingering effect" on her compensation of long-past recall and promotion decisions rather than a "continuing pattern of discriminatory conduct." *Id.* at 34a, 37a.

The Tenth Circuit acknowledged that the "[c]ontinuing effects of prior discrimination are generally not actionable," but nevertheless reversed. Focusing on the pay differential caused by the challenged recall, demotion, and promotion decisions rather than the operative decisions themselves, the court claimed that there is "a crucial distinction [between] discriminatory disparities in pay" and all other types of discrimination. *Id.* at 7a. Relying on one sentence in Justice Brennan's concurring opinion in *Bazemore v. Friday*, 478 U.S. 385, 395 (1986), the court below held that pay discrimination must always "be viewed as a continually recurring series of violations," because "each week's paycheck" is a wrong separately actionable under Title VII. *Id.* at 8a, quoting, in part, *Bazemore*, 478 U.S. at 395-96. The court of appeals concluded that Goodwin's pay discrimination claim was not time-barred, and remanded the case for trial.

3. The Court is presently considering *National Railroad Passenger Corp. v. Morgan*, No. 00-1614, *cert. granted*, 533 U.S. 927 (2001), a case involving the so-called continuing violation theory and its application to discrimination cases under Title VII. In that case, the Chamber has urged the Court to limit the application of the continuing violation theory lest the theory swallow whole the principles of finality, prompt dispute resolution, and repose that are central to the administration of Title VII.

No matter how this Court balances those interests in *Morgan*, however, the dispute at issue in this case will remain. Guidance as to when the continuing violation theory might be applicable will not dispel the notion, reflected in the decision

below and adopted by five other courts of appeals, that compensation cases are fundamentally different from those involving other "tangible employment actions."

Indeed, if the "paycheck" doctrine embraced by the court below is left unaddressed by this Court, the work done by the Court in *Morgan* may go for naught, as plaintiffs gerrymander their claims to fit the special "paycheck" rules currently applicable in six circuits. A writ of certiorari in this case — in combination with a decision in *Morgan* — would do much to resolve the intractable disputes roiling in the lower courts on the application of Title VII's limitations provisions.[2]

SUMMARY OF ARGUMENT

1. After considerable debate, Congress consciously imposed "quite obviously short deadlines" for filing charges of discrimination under Title VII. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). An individual seeking to challenge an allegedly discriminatory employment action must file an EEOC charge within 300 days at the most. An action not promptly challenged becomes "an unfortunate event in history which has no present legal consequences." *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977).

2. The rule applied below — that every alleged wrong with an impact on an employee's paycheck remains actionable throughout the employee's tenure — eviscerates the deliberate policy choices made by Congress in crafting a statute of limitations for Title VII claims. That rule would allow an employee to challenge actions occurring years and even decades earlier, forcing employers to defend the conduct of supervisors

2. A ruling in this case could also affect cases brought under other federal discrimination statutes such as 42 U.S.C. § 1981, the Age Discrimination in Employment Act, and the Equal Pay Act . The lower federal courts have typically applied the Court's Title VII precedents in these contexts. *See, e.g., Crawford v. Western Elec. Co.*, 614 F.2d 1300 (5th Cir. 1980) (class action under Title VII and § 1981); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 345 n.19 (4th Cir. 1994).

long-since retired or dead, and involving records that have long since been discarded.

3. The decision below exacerbates and intensifies a mature and intractable circuit split on this vital issue that affects nearly every employment discrimination claim. The Court has previously acknowledged that when there is intra-circuit "conflict, confusion, and uncertainty concerning" the limitations rules applicable to civil rights cases, "compelling reasons [exist] for granting certiorari." *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). Moreover, if the decision below is allowed to stand, any accommodation of competing interests the Court might reach in *National Railroad Passenger Corporation v. Morgan*, No. 00-1614, concerning the continuing violation doctrine, would be advisory only, as a plaintiff could always characterize his or her claim as a pay disparity, and thereby challenge any employment action during his or her entire tenure.

4. The court of appeals supposed that its decision was compelled by *Bazemore v. Friday*, 478 U.S. 385 (1986). Nothing in *Bazemore* requires, or even recommends, the result reached below. In *Evans v. United Airlines*, 431 U.S. 553 (1977), and again in *Bazemore v. Friday*, the Court held that a complainant must file a charge of discrimination promptly following the occurrence of the unlawful act or practice the complainant seeks to challenge, and cannot base a valid claim solely on the continuing impact of a statutory violation occurring outside the limitations period.

Bazemore also held that an employer could not defend a facially discriminatory pay structure — one that *currently* discriminates — by arguing that it had engaged in the same discriminatory conduct outside the limitations period without complaint. In the context of such a facially discriminatory system, the Court observed that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478 U.S. at 395-96. As the Court has subsequently noted, this

rule is limited to *currently operating*, facially discriminatory systems. No such system was alleged in this case.

Nonetheless, the court below, and at least six other courts of appeals, have read this one sentence in *Bazemore* to eliminate any meaningful statute of repose in Title VII cases involving compensation. Four other courts of appeals have harmonized *Evans* and *Bazemore* in a way that effectuates the plain language of the statute, gives complainants a mechanism for vindicating their civil rights, and underscores the importance of repose inherent in every statute of limitations. This division of authority will persist until this Court resolves it.

2. The courts of appeals are also sharply divided as to how far back in time a district court may extend an award of back pay. Some courts have held that the district court's remedial authority extends no further than the beginning of the charge-filing limitations period (either 180 or 300 days, depending on the jurisdiction)[3]; others have held that the court can award back pay for a two-year period prior to the date on which the charge was filed, although some make the extended period available only with proof of a continuing violation. This is a significant issue that arises in almost every case in which a plaintiff is entitled to back pay, and can more than double a plaintiff's back pay award. A clear rule is needed to prevent forum-shopping and to ensure that similarly situated plaintiffs recover comparable awards.

REASONS FOR GRANTING THE WRIT

I. THE RULE ESTABLISHED BY THE COURTS OF APPEALS ELIMINATES ANY MEANINGFUL LIMITATIONS PERIOD IN TITLE VII CASES, IS IRRECONCILABLE WITH THIS COURT'S OPINIONS, AND DEEPENS A DIVISION OF AUTHORITY AMONG THE COURTS OF APPEALS.

"By choosing what are quite obviously short deadlines [for filing charges of discrimination under Title VII], Congress clearly intended to encourage the prompt processing of all

3. 42 U.S.C. § 2000e-5(e)(1).

charges of employment discrimination." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). The rule adopted by the court below ignores this compelling societal interest and eviscerates Congress' conscious design. The court felt compelled to reach this result by a single sentence in *Bazemore*, but nothing in that decision suggests that a complainant is entitled to lie in wait for years — even decades — before forcing an employer to justify a discrete employment decision rendered by managers who may well have quit, retired or died in the interim. The decision below is fundamentally at odds with the notions of repose on which administration of the Act depends.

A. Congress Adopted Title VII's Charge-Filing Limitations Period to Achieve a Careful Balancing of Employer and Employee Rights.

Statutes of repose serve compelling societal interests. They "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). Thus, a limitations period "reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Delaware State College v. Ricks*, 449 U.S. 250, 259-60 (1980) (internal quotes omitted), quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975).

By definition, every limitation period expresses society's interests in repose,[4] but those interests are particularly compelling in the employment setting. Unlike litigants in the great run of civil cases — who often are strangers or parties to one-time or episodic commercial agreements — the relationship between employers and employees is of central and continuing

4. *See, e.g., Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (rejecting rule that "conflicts with a basic objective — repose — that underlies limitations periods"); *Wilson*, 471 U.S. at 271 ("application of any statute of limitations would promote repose").

importance to both. Even employment decisions that appear on their face to affect only a single employee usually have an impact on many others; when one employee receives a promotion or is allocated the top merit pay increase in her department, that opportunity, or those dollars, cannot not go elsewhere. *Cf. US Airways v. Barnett*, __ U.S. __, No. 00-1250, 2002 U.S. LEXIS 3034 (April 29, 2002). When an employer makes these allocation decisions, then, everyone involved has an interest in settling promptly any challenges to them.

Moreover, to defeat a claim of discrimination, an employer must be able to articulate — convincingly — its rationale for the challenged decision, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *Hicks v. St. Mary's Honor Ctr.*, 509 U.S. 502, 506-07, 513-14 (1993), but the employer's ability to muster a defense dissipates sharply as time passes. Memories fade; managers quit, retire or die; records are lost or destroyed to make way for still other records.[5] Business units are reorganized, disassembled, or sold; tasks are centralized, dispersed, or terminated altogether.

Unless an employer receives prompt notice that it will be called upon to defend a specific decision, it will have no "opportunity to gather and preserve the evidence with which to sustain himself. . . ." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372 (1977) (quoting Congressman Erlenborn, 117 Cong. Rec. 31972 (1971)). By compelling those injured to raise their claims promptly, Title VII's limitations period "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-57. Thus, "[e]ven if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation. . . . [T]he right to be free of stale claims in time comes

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5. The EEOC has said that, in most instances, an employer is not obligated to keep personnel records for more than one year, tacitly acknowledging that employers should not be called to account for older decisions. *See* 29 C.F.R. § 1602.14 (requiring employers to keep most employment records for one year).

to prevail over the right to prosecute them." *American Pipe & Constr. Co.*, 414 U.S. at 554. In short, only a meaningful rule of limitations makes it possible for an employer to articulate the rationale of its managers for a discrete employment decision, and only with such a rationale in hand can it hope to defend against even the most baseless charge of discrimination. *Wilson*, 471 U.S. at 271 ("[j]ust determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost").[6]

And that, of course, is precisely why Congress purposefully selected a short charge-filing limitations period (either 180 or 300 days).[7] *See, e.g., Mohasco Corp.*, 447 U.S. at 825 ("Congress clearly intended to encourage the prompt processing of all charges of employment discrimination"); *Occidental Life Ins. Co.*, 432 U.S. at 372 (1977) (Congress enacted Title VII's limitations period "to protect fully the rights of the person or persons against whom the charge is filed") (quoting S. Rep. No. 92-415, p. 25 (1971)).

B. The Decision Of The Court Of Appeals Effectively Undermines The Societal Interest In Repose.

The rule adopted by the court of appeals cannot be reconciled with these principles. The court below concluded that a complainant could lawfully challenge a discrete employment decision years or decades after the fact, so long as the economic consequences of that decision persist into the limitation period. That rule is incompatible with Congress' design and the notions of "essential fairness to defendants" that underlie all statutes of repose. *American Pipe & Constr. Co.*, 414 U.S. at 554.

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6. The case for definitive and unambiguous rules of limitation is at its strongest with "a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Mohasco Corp.*, 447 U.S. at 816 n.19 (citation omitted).

7. 42 U.S.C. § 2000e-5(e); *cf.* 29 U.S.C. § 160(b) (providing for six-month limitations period for filing unfair labor practice charge).

Goodwin's complaint sought to force GM to defend the merits of employment decisions it made up to *eighteen years* before she filed her charge. Pet. App. at 29a, 32a. She complained, for example, that when she was recalled from a layoff in 1993, she had been placed improperly in petitioner's salary grid. She protested her placement to two of petitioner's managers at the time she was "wrongfully" slotted, but she did not file her charge of discrimination until as much as *six years later.*[8] By now, however, one of the managers to whom she claims to have complained is dead and the other is retired. Pet. Br. at 7 n.1. "Preserving a right of action for such a vast stretch of time would . . . thwart[] the basic objective of repose underlying the very notion of a limitations period." *Rotella v. Wood*, 528 U.S. 549, 554 (2000).

According to the court of appeals, the rule it articulated is applicable only to "pay discrimination" cases; for every other mode of discrimination, complainants are obligated to act with dispatch. The text of Title VII makes no such distinction, and as explained *infra* at pp. 12-14, neither do the Court's opinions.

But more fundamentally, experience teaches that the distinction between "pay" cases on the one hand, and "everything else" on the other, is an illusion. A discrimination case typically begins with a demonstration that the plaintiff has suffered a "tangible employment action"; for an employer's conduct to constitute tangible employment action, there must be "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998). Thus, nearly every discrimination case will involve a decision with a demonstrable impact on compensation. Any "exception" to the ordinary rules of repose that would permit a plaintiff to challenge adverse "employment actions" that are decades old, based on a continuing impact on pay, would push the general

8. Goodwin claimed to be uncertain as to precisely when the conversation occurred.

rule of repose to the margins of the statute, where it would come into play only with respect to the claims of exceptionally inartful plaintiffs.

This is not mere prediction. In *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir. 1995), for example, the Sixth Circuit — following the approach adopted by the Tenth Circuit below — held that the plaintiffs filed their charge too late to challenge their assignment to non-union jobs, but nonetheless were entitled to challenge the pay disparity resulting from that allegedly discriminatory assignment. Similarly, in *Nealon v. Stone*, 958 F.2d 584, 591-92 (4th Cir. 1992),[9] the court followed this same rationale to conclude that the plaintiff could challenge a job classification decision made well outside the limitations period because that classification decision had ongoing economic consequences, reflected in "each paycheck" the plaintiff received.

Indeed, in *Evans*, the Court noted that in the limitations arena, clever characterization could easily overcome reasoned rules of law. There, the plaintiff sought to challenge the current *consequences* of a decision made long ago — a decision that deprived her of seniority, and thus compensation, within the limitations period. The Court concluded that

> the mere fact that a past event . . . has affected the calculation of seniority credit [and thus the plaintiff's present paycheck, does not give the plaintiff a timely charge], even if the past event might at one time have justified a valid claim against the employer. *A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations.*

Evans, 431 U.S. at 560 (emphasis added).

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9. *Nealon* was an Equal Pay Act case, but it purported to apply this Court's Title VII limitations decisions.

C. The Courts Of Appeals Are In Disarray On The Application Of Title VII's Limitations Period, Especially In Cases Characterized As "Pay" Or "Compensation" Cases.

The courts of appeals are divided into two "camps" in applying Title VII's limitations period to claims characterized as "pay" or "compensation" disputes, however ill-defined that category might be. These are not merely academic differences in analytical approach; in four circuits, Congress's charge-filing limitations period is enforced with some degree of rigor (properly, in the Chamber's view). In six other circuits, there effectively *is* no limitations period in most "compensation" cases. In these circuits, an aggrieved employee may, if he chooses, file a charge within the statutory period following the relevant adverse employment action he challenges, or he may wait until he or she retires — years or decades later — without any adverse consequences for the timeliness of the claim.

This remarkable divergence can be attributed to a single passage — indeed, to a single sentence — in *Bazemore v. Friday*, 478 U.S. at 395-96.[10] Heedless of the Court's admonition that it is "generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code," *St. Mary's Honor Ctr.*, 509 U.S. at 515, six courts of appeals have drawn from this language in *Bazemore* an exception, not merely to the Court's other Title VII cases, but to the Court's more general conviction that excessive lenity in matters of timeliness "would bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability." *Rotella*, 528 U.S. at 559 (a period of limitations stretching eight years would defeat interest in repose). That result is neither compelled nor even permitted by the Court's cases, as explained below.

10. The Court entered a brief *per curiam* opinion in *Bazemore*, which indicated general agreement with the accompanying concurring opinion of Justice Brennan, in which the other Justices joined. All of the language cited in this brief and relied upon by the court below appears in Justice Brennan's concurring opinion.

1. The Court's Cases Reflect A Unified Standard To Limitations Questions Under Title VII.

United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), *Bazemore*'s precursor, establishes the prevailing Title VII limitations rule: "a discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed [even if that act has] a continuing impact on [the charging party's] pay and fringe benefits. . . . [M]ere continuity" of impact is not enough to turn a stale claim into a timely one. *Evans*, 431 U.S. at 558. *Bazemore* applied that rule to a facially discriminatory salary system, as explained below.

a. Evans was a flight attendant. When she married, the airline's policies forced her to quit. When the no-marriage rule was subsequently eliminated, she returned to work, but the airline refused to give her seniority credit for the duration of her compelled absence. When she sued the airline, she did *not* seek back pay for the period predating her return but, because her seniority determined her pay rate, and it had been depressed by the airline's prior discrimination, she sought compensation for the shortfall in her *current* paychecks.

The Court held, however, that Evan's ongoing economic disadvantage was merely a lingering consequence of a statutory violation occurring outside the limitations period, and thus was time-barred. "United was entitled to treat that past act [*i.e.* Evan's termination] as lawful after respondent failed to file a charge of discrimination" within the statutorily prescribed period. *Id.* at 558. Although Evans claimed that a *current* violation existed, because each paycheck she received contained less money than she would have received had her seniority been adjusted to remedy the prior discrimination, the Court rejected Evan's focus on her current paycheck. Nearly every claim has a financial component, the Court observed, and the rule urged by Evans "would substitute a claim for seniority credit for almost every claim which is barred by limitations." *Id.* at 560.

b. *Bazemore* involved an overtly discriminatory pay policy established before the employer, a state agency, was subject to Title VII. 478 U.S. at 390-91. Although the agency eliminated the race-specific categories that had characterized the system once it became subject to the Act in 1972, the discriminatory pay policy continued thereafter. *Id.* at 391.

The court of appeals held that the employees' discrimination claims were time-barred, but this Court reversed. *Id.* at 386-88. An employer, the Court held, could not defend a *current* facially discriminatory pay structure by arguing that it had previously engaged in the same discriminatory conduct without complaint. "[T]o the extent an employer continue[s] to engage in [a discriminatory] act or practice [within the limitations period], it is liable" under Title VII. *Id.* at 394-96. It was in this context that Justice Brennan observed that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96.

c. Twice, the Court has explained the relationship between *Evans* and *Bazemore*. *Bazemore* itself explained the critical distinction: the employer in *Bazemore* had continued to impose, within the limitations period, a facially unlawful pay system intended to perpetuate a discriminatory regime begun before the Act applied to it. In contrast, the "Respondent [in *Evans*] made no allegation that the seniority system itself was intentionally designed to discriminate." *Bazmore*, 478 U.S. at 396 n.6. The Court thus drew a distinct line between "system[s] intentionally designed to discriminate," which can be challenged every time the system effects a discriminatory result, and discrete, non-systemic employment decisions, which must be challenged at the time they occur.

Similarly, in *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900 (1989), a case challenging an allegedly discriminatory seniority system, the Court explained that with:

> a facially neutral system, the discriminatory act occurs *only* at the time of adoption. . . . [Conversely,] a facially

> discriminatory system [like the pay structure at issue in *Bazemore*] by definition discriminates every time it is applied. This is a material difference for purposes of the analysis we employed in *Evans* and *Ricks* — which focuses on the timing of the *discriminatory* act for purposes of the statute of limitations. It . . . also [explains the "each week's paycheck" language] of *Bazemore v. Friday*. . . .[11]

Id. at 912 n.5 (emphasis in original). *Lorance* thus underscored the ingredient essential to the *Bazemore* holding: a "facially discriminatory system" operating within the limitations period.

2. The Courts of Appeals' Divergent Interpretations of Bazemore Have Created Inconsistent Rules Governing the Application of Title VII's Limitations Periods to Pay-Related Discrimination Claims.

Like the *Lorance* Court, the Sixth, Seventh, D.C. and Federal Circuits have all found in *Bazemore* a special application of the general rule of limitations, applicable to cases involving "facially discriminatory system[s]." *Lorance*, 490 U.S. at 912 n.5. In these courts, the "critical question" is not the type of employment benefit affected by the alleged discrimination — pay, promotion, discharge, etc. — but "whether any present violation exists." *Evans*, 431 U.S. at 558. The Second, Third, Fourth, Eighth, Tenth and Eleventh Circuits, conversely, read *Bazemore* as establishing a unique rule of limitations in cases involving pay discrimination. These conflicting interpretations

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11. *Lorance's* application to seniority systems was superseded by the Civil Rights Act of 1991, but the statute left the *Evans* limitations rule unaffected outside of the seniority system context. *See, e.g.*, 137 Cong. Rec. S15485 (1991) (interpretive memorandum of Sen. Danforth ("[t]his legislation should not be interpreted to affect the sound rulings of the Supreme Court regarding 'continuing violations' theory under Title VII").

of the Court's decisions will not be reconciled unless and until the Court determines which is correct.

a. The "Present Violation" Approach.

Dasgupta v. University of Wis. Bd. of Regents, 121 F.3d 1138 (7th Cir. 1997), is typical of the circuit opinions adopting the "present violation" approach to *Bazemore* and *Evans*. In *Dasgupta*, a professor alleged pay discrimination stemming from decisions made over two decades, but *during the limitations period* he had received raises that were comparable to those received by his peers. Writing for the court, Judge Posner found *Bazemore* inapplicable because in *Bazemore* "the illegal act [was] repeated during the limitations period," while in *Dasgupta*, the plaintiff sought simply to "rectify the [economic] consequences of time-barred" pay decisions. *Id.* at 1140. A contrary ruling, the court explained, would "unravel the statute of limitations." *Id.*

The Seventh Circuit has reaffirmed this "present violation" approach in two subsequent cases. *See Snider v. Belvidere Township*, 216 F.3d 616, 618 (7th Cir. 2000) ("the continued receipt of lower paychecks does not revive past allegedly discriminatory conduct"); *Christiansen v. APV Crepaco, Inc.*, 178 F.3d 910, 915 (7th Cir. 1999) (claim that denial of skills-based pay breached collective bargaining agreement was time-barred; ongoing pay effect stemmed from decision six years earlier and was not actionable). A number of other federal courts of appeals — including those in the Sixth, D.C., and Federal Circuits — have adopted a similar analysis in the context of pay-related discrimination claims. *See, e.g., Anderson v. Zubieta*, 180 F.3d 329, 337 (D.C. Cir. 1999) (reversing summary judgment for employer; where plaintiffs offered evidence that pay disparities were "caused by the continued maintenance of a broadly discriminatory pay and benefits system," new violations occurred during limitations period); *Bosley v. Merit Sys. Protection Bd.*, 162 F.3d 665, 667 (Fed. Cir. 1998) (claim based on denial of pay increase was time-barred even though monetary effects continued into the future); *EEOC v. Penton Indus. Publ'g*

Co., 851 F.2d 835, 838 (6th Cir. 1988) (dismissing pay disparity claim; claim challenged isolated employment decision outside limitations period rather than long-standing and demonstrable policy of discrimination).[12]

b. The "Paycheck" Approach.

The court below expressly rejected the "present violation" approach urged by Judge Posner in *Dasgupta*, and, based on its reading of the "paycheck" language from *Bazemore*, held that a plaintiff need not act within the time limits prescribed by Section 706(e) to challenge a discrete compensation-related decision. Indeed, the court drew from *Bazemore* a rule that would entitle an employee to wait until the end of his or her career before challenging such a decision.

The Second, Third, Fourth, Eighth and Eleventh Circuits have adopted the same rule. Most of these courts have described these ongoing wage disparities as a continuing violation. *See Cardenas v. Massey*, 269 F.3d 251, 257-58 (3d Cir. 2001) (discriminatory wage payments constitute a continuing violation); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir. 1995) (gender discrimination claim regarding assignment of plaintiff to non-union job was time-barred, but resulting pay disparity was still actionable seven years later, based on *Bazemore*'s "paycheck" language); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 347-48 (4th Cir. 1994) ("an act of sex discrimination in compensation first inflicted at the date of hiring can thereafter continually violate the plaintiff's rights" due to ongoing pay disparity, even when hiring decision occurred outside limitations period);

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12. *See also Tademe v. St. Cloud State Univ.*, 2001 U.S. Dist. LEXIS 20666, at *14 (D. Minn. Dec. 10, 2001) (plaintiff's claim challenging the ongoing economic consequences of a 1991 hiring placement decision were time-barred; decision was "not a repeated and on-going decision" by the employer and the resulting lower paychecks do not constitute new violations); *Williams v. Munoz*, 106 F. Supp. 2d 40, 42-43 (D.D.C. 2000) (failure to promote claim was time-barred even though current paychecks were lower as a result).

Calloway v. Partners Nat'l Health Plans, 986 F.2d 446, 449 (11th Cir. 1993) (reversing district court's finding that hiring decision that caused pay disparity was discrete act rather than continuing violation; "[w]hen the claim is one for discriminatory wages, the violation exists every single day the employee works"); *Nealon v. Stone*, 958 F.2d 584, 591-92 (4th Cir. 1992) (plaintiff could challenge employer's job classification decision even though it occurred outside the limitations period, because of ongoing pay disparity; relying on *Bazemore*'s "paycheck" language).[13]

The Second Circuit has reached a similar conclusion, relying on the *Bazemore* "paycheck" language, but has concluded that wage disparities represent a series of discrete violations rather than a continuing violation. *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 119 (2d Cir. 1997) (pay discrimination "is fundamentally unlike" other types of discrimination; quoting *Bazemore*'s "paycheck" language).

The rule adopted by these courts "would permit plaintiffs who know of a [violation] to wait, 'sleeping on their rights,' as the . . . damages accumulate, perhaps bringing suit long after the 'memories of witnesses have faded or evidence is lost.' " *Klehr*, 521 U.S. at 187. If, as this Court has observed, "Congress clearly intended to encourage the prompt processing of all charges of employment discrimination," that rule of law cannot stand. *Mohasco Corp.*, 447 U.S. at 825. The Court should grant review in this case to eliminate this division of authority and correct the court of appeals' misguided application of federal law.

13. The Eleventh Circuit has concluded that this "paycheck" approach should be limited to wage disparities, and does not extend to disparities in stock dividends. *Carter v. West Publ'g. Co.*, 225 F.3d 1258, 1264-65 (11th Cir. 2000) (disparities in stock dividends constituted "present effects of a one-time violation," because they derived solely from the employer's previous decision as to who could participate in stock program, and the program ended two years before a charge was filed). The Eleventh Circuit's hairsplitting on which types of compensation should be covered by the "paycheck" exception underscores that this reading of *Bazemore* is unworkable.

II. THE COURT SHOULD ALSO RESOLVE THE SPLIT IN THE CIRCUITS OVER THE CALCULATION OF TITLE VII BACK PAY AWARDS.

Section 2000e-5(g) of Title VII provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission," but does not specifically provide for when, or whether, a court may award back pay for a period greater than 180 or 300 days, the filing period for charges of discrimination under Title VII. The circuit courts have produced at least three interpretations of how Section 2000e-5(g) should be applied.

Some courts have held that back pay is recoverable only for a period beginning with the charge-filing limitations period.[14] Other courts have held that back pay may be recovered for two years in every Title VII case, regardless of whether a continuing violation is shown[15]; and a third group allows successful

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14. In *Ashley v. Boyle's Famous Corned Beef Co.*, the *en banc* Eighth Circuit found a plaintiff's discriminatory pay claim to be timely, based on the continuing violation theory, but nevertheless limited recovery to the 300-day charge-filing limitations period applicable to Title VII claims in Missouri. 66 F.3d at 168. *See also Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 684 n.3 (8th Cir. 2001); *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 119 (2d Cir. 1997) (citing *Ashley* with approval); *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 800 (11th Cir. 1992) (even where a continuing violation exists, plaintiff may recover only for 180-day filing period); *Blake-McIntosh v. Cadbury Beverages, Inc.*, No. 3:96-CV-2554 (EBB), 1999 WL 643661, at *8 (D. Conn. Aug. 10, 1999) (disallowing recovery of back pay beyond 300-day filing period).

15. *See, e.g., EEOC v. O&G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 880 (7th Cir. 1994) (district court "properly limited recovery [of back pay] in accordance with the two year limitation of Title VII"), *cert. denied*, 513 U.S. 1198 (1995); *Estate of Pitre v. Western Elec. Co.*, 975 F.2d 700, 705-06 (10th Cir. 1992), *cert. denied*, 510 U.S. 972 (1993); *EEOC v. Joe's Stone Crab, Inc.*, 15 F. Supp. 2d 1364, 1376 (S.D. Fla. 1998), *vacated on other grounds*, 220 F.3d 1263 (11th Cir. 2000); *Bempah v. Kroger Co.*, No. CV488-200, 1989 U.S. Dist. LEXIS 6345 (S.D. Ga. June 5, 1989).

plaintiffs to recover back pay measured by this two year window only where there is a continuing violation.[16]

For all of the reasons given in GM's petition, the Chamber believes that the Court should grant review on this issue as well. In addition, the Chamber notes that it is inherently unsatisfactory to have the nation's primary anti-discrimination statute administered in such a fundamentally inconsistent fashion based solely on geography. Most of the individual businesses that belong to the Chamber do business in more than one state, and a great many do business in all or nearly all of them. Widely disparate rules on questions of fundamental importance, like the remedial reach question posed here, merely invite forum shopping. Only the Court can harmonize the law on this point, and the Chamber submits it should do so in this case.

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16. *See, e.g., Sabree v. United Bhd. of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 401 & n.11 (1st Cir. 1990); *Stallworth v. Shuler*, 777 F.2d 1431, 1435 (11th Cir. 1985); *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1560 & n.4 (5th Cir. 1985); *Acha v. Beame*, 570 F.2d 57, 65 (2d Cir. 1978); *Eisenberg v. Pennsylvania State Univ.*, No. 3:00CV301, 2001 WL 202095, at *7 (M.D. Pa. Feb. 28, 2001) (citing *Garland v. USAir, Inc.*, 767 F. Supp. 715, 727 (W.D. Pa. 1991)).

CONCLUSION

The petition should be granted and the decision of the court of appeals reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

PAMELA R. GOODWIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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INTRODUCTION

The petitioner General Motors Corporation ("GM") asserts that the Court should grant a writ of certiorari to consider a split among the circuits on the proper application of this Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1984), to Title VII's filing requirement in cases involving continuing discrimination in salary. In asserting its arguments, however, the petitioner ignores a critical fact that is discussed in the opinion by the United States Court of Appeals for the Tenth Circuit.

At the time she filed her charge, Ms. Goodwin worked for GM as a labor relations representative. She had first been appointed to that position in late 1991. App. at 4a. At the time of her promotion, she was given a salary more than three hundred dollars per month lower than the white employees who held the same position. That salary disparity grew over a period of years to more than five hundred dollars monthly. App. at 5a. As the court of appeals discussed, GM maintained a policy requiring employees to keep salary information confidential. That policy kept Ms. Goodwin from discovering the disparity in her salary until March of 1998. App. at 5a-6a. At that time, she received a printout showing the salaries of all of the employees in her department. She filed her charge with the Equal Employment Opportunity Commission within 300 days of learning of the disparate treatment. The suppression of salary information was a factor considered by the Tenth Circuit in determining that Ms. Goodwin timely filed her charge. App. at 11a.

GM asserts that decisions from the Seventh and Eleventh Circuits conflict with the decision below. However, GM ignores the critical fact that GM's confidentiality

policy kept Ms. Goodwin from knowing that she had been continually subjected to disparate treatment during her service has a labor relations representative. In this opposition, Ms. Goodwin will demonstrate that the Seventh Circuit and all courts of appeals that have considered the issue would have concluded that Ms. Goodwin timely filed her charge of discrimination. Accordingly, the instant case raises no split of authority among the circuits.

The petitioner also seeks a ruling that would limit back pay to 300 days, not two years, as provided by 42 U.S.C. § 2000e-5(g)(1). That argument is at odds with the statute's plain language and with this court's contrary ruling in *National Railroad Passenger Corporation v. Morgan*, 122 S. Ct. 2061 (2002), and thus provides no basis for review.

REASONS FOR DENYING THE WRIT

I. Every Court Of Appeals Would Reach The Same Conclusion As Did The Tenth Circuit On The Facts Presented Here.

GM argues for an interpretation of the filing requirements under Title VII that would insulate salary decisions from liability for discrimination as long as the employer is able to conceal the relative salary level of its employees for more than 300 days. Pamela Goodwin did not know that she was paid less than her co-workers until she received a document showing the compensation paid to all of the labor relations representatives. App. at 5a-6a. This crucial fact demonstrates that, as applied to this case, there is no split of authority among the circuits. Indeed, if faced with the fact that GM's confidentiality policy concealed the

race-based disparity in wages, the Seventh and Eleventh Circuits would have ruled just as the Tenth Circuit did. Because Ms. Goodwin filed her EEOC charges within 300 days of discovering the race-based pay disparity, those circuits, and indeed, all circuits that have considered *Bazemore*'s analysis of wage discrimination, would have ruled that Ms. Goodwin's claim was timely.

In *Dasgupta v. University of Wisconsin Board of Regents,* 121 F.3d 1138 (7th Cir. 1992), the principal case upon which the petitioner relies, the court defined a continuing violation as follows:

> A continuing violation is one that **could not reasonably have been expected** to be made the subject of a lawsuit when it first occurred because its character as a violation **did not become clear** until it was repeated during the limitations period. *Id.* at 1139. (emphasis added)

The character of GM's discrimination against Ms. Goodwin did not become clear until she received the document identifying the race-based disparity in her salary. She might have been dissatisfied with her salary, but she had no reason to know that she was paid significantly less than her white peers until she received the salary document.

Similarly, the Eleventh Circuit in *Carter v. West Publishing Co.,* 225 F.3d 1258 (11th Cir. 2000), considered, but rejected a traditional tolling analysis of the plaintiff's claims for discrimination in the administration of the employee stock ownership plan. The court referred to evidence that the plaintiffs were well aware, before the

limitations period, that women were denied the opportunity to purchase stock. To the contrary, here, the Tenth Circuit recognized that, as a result of GM's confidentiality policy, Ms. Goodwin was not aware that she was paid less than her white peers until fewer than 300 days before she filed her EEOC charges. App. at 6a. Given the effective suppression of salary information by GM's confidentiality policy, the Eleventh Circuit would have also concluded that Ms. Goodwin timely filed her charge after first learning of the race-based disparity in her salary.

Other cases from the Seventh and Eleventh Circuits show that the same result would have occurred had Ms. Goodwin's case been heard in those courts. For example, in *Wagner v. Nutrasweet Co.*, 95 F.3d 527 (7th Cir. 1996), the Seventh Circuit concluded that the plaintiff could properly bring a claim for payroll discrimination because she received discriminatory salary payments within the period for filing a Title VII claim. The plaintiff had received a severance package in return for which she had waived all claims for employment discrimination. Following the waiver of her claims, she was placed in a temporary position during a transition period with the company. The salary in the transitional position was based on the salary she received prior to the execution of the waiver. That salary was less than the salary received by similarly situated males. The company argued that she could not allege discrimination in salary because she had waived all claims for discrimination regarding her pre-severance compensation. The Seventh Circuit, however, relying on *Bazemore*, concluded that each paycheck Wagner received at a level lower than her peers constituted a new violation.

Authority showing that the Eleventh Circuit would have reached the same result as did the Tenth Circuit is

found in *Calloway v. Partners National Health Plans*, 986 F.2d 446 (11th Cir. 1993). In *Calloway*, the court considered the application of the *Bazemore* rule to a plaintiff who had been hired at a salary level lower than her white predecessor. The hiring occurred more than 300 days before a claim alleging wage discrimination was filed. The district court had ruled that the continuing disparity in wages was merely an effect of the prior discrete act of hiring her at a lower salary. The Eleventh Circuit reversed, following *Bazemore,* to conclude that each paycheck should be counted as a new violation. Similarly, the Eleventh Circuit, if faced with the fact that GM had set Ms. Goodwin's salary as a labor relations representative significantly lower than her white peers, and that it continued to pay her at a lower rate, would have concurred with the Tenth Circuit that each paycheck at the lower amount constituted a new violation.

Because the authorities in the Seventh and Eleventh Circuits show that those courts would have reached the same result as the Tenth Circuit, there is to be no split of authority over the timeliness issue raised by Ms. Goodwin's claims. Moreover, a review of the authority in each of the circuits that have reached the issue reveals that the result would likely have been the same in those courts. *See, e.g., Pollis v. New School for Social Research*, 132 F.3d 115 (2d Cir. 1997) (applying *Bazemore* to a claim for ongoing salary discrimination); *Cardenas v. Massey,* 269 F.3d 251 (3d Cir. 2001) (applied *Bazemore* to claim for a discriminatory application of pay classifications to an individual); *Brinkley-Obu v. Hughes Training*, 36 F.3d 336 (4th Cir. 1994) (applied *Bazemore* to Title VII and Equal Pay Act claims); *Ashley v. Boyles Famous Corned Beef*, 66 F.3d 164 (8th Cir. 1995) (followed *Bazemore* to permit

claim for pay discrimination based on gender segregated job classifications); *Anderson v. Zubieta*, 180 F.3d 329 (D.C. Cir. 1999) (applied *Bazemore* to ongoing pay discrimination).

Because there is no split of authority among the circuits, the petition should be denied.

II. This Court's Decisions Leave No Doubt To The Proper Application Of Title VII's Filing Requirements To Claims For Unequal Wages.

In *Bazemore v. Friday*, this Court taught that pay discrimination that began during a period in which a claim would be barred, but persists into a period in which the claim would be timely, continues to be actionable under Title VII: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong, actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478 U.S. at 396. As discussed above, the courts of appeals have consistently applied the above rule to claims for pay discrimination so long as the disparate treatment continues into the filing period for relief under Title VII.

The petitioner suggests that other precedents of this Court lead to a different result. GM points to *United Air Lines v. Evans*, 431 U.S. 533 (1977); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); and *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900 (1989), as authority for the point that continuing effects of past discrimination are not actionable if the past discrimination occurred before the filing deadline for Title VII claims. Each of those cases, however, involved a discrete act of discrimination other than the establishment of a salary. Once a professor has

been denied tenure, as in *Ricks*, or a flight attendant has been forced to resign, as in *Evans*, the discriminatory act has occurred.

Lorance v. AT&T turned on the special treatment Congress has given seniority systems in the discrimination laws. The plaintiffs presented evidence in *Lorance* that the seniority system to which they had been subjected had been implemented with a discriminatory purpose. The plaintiffs did not assert that the seniority system was discriminatory on its face. Because of the special treatment accorded seniority systems and the reliance of other employees on the facially neutral system, the Court determined that the statute of limitations began to run from the date of the alleged discriminatory act – the implementation of the seniority system – rather than the date upon which its effects were felt.[1] 490 U.S. at 211-12.

This Court recently considered continuing violations in the context of Title VII, but set forth no reason to question its holding in *Bazemore*. In *Morgan, supra*, 122 S. Ct. 2061, the Court concluded that the time limit for filing a charge of discrimination begins to run with each discrete act of discrimination by an employer. The Court acknowledged that *Bazemore* teaches that each discriminatory paycheck is a discrete act of discrimination. *Id.* at 2071. Having just recently cited *Bazemore* as controlling law on the accrual of claims for wage discrimination, the Court need not revisit the issue here.

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[1] Congress has since acted to reverse the effect of *Lorance*. *See* 42 U.S.C. § 2000e-5(e)(2); *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992), in which the court noted that one purpose of the 1991 amendments to the Civil Rights Act was to reverse the holding in *Lorance*.

The continuing viability of *Bazemore*'s timeliness rule to claims for pay discrimination is demonstrated by its application to the facts of Ms. Goodwin's case. Ms. Goodwin worked in an environment in which company policy prevented her from knowing of the salary level that her co-workers received. Disparate treatment by definition requires one to consider the treatment of one person relative to the treatment accorded another. When a non-minority receives a promotion over a minority, it is entirely clear that the minority employee has been treated differently than the non-minority employee. Similarly, a woman who is required to resign because of marriage, when a male co-worker is not, knows that she has been treated differently.

Many employees, like Ms. Goodwin, do not know the salary that their co-workers receive. They do not know whether they are treated differently. Abandonment of the *Bazemore* rule in these circumstances would allow an employer to intentionally discriminate against an employee in setting his or her salary, hide the discrimination under the guise of salary confidentiality, and after one hundred eighty days, perpetuate the discrimination without fear of accountability under the discrimination laws. This is certainly not the result intended by Congress.

The rule announced in *Bazemore* prevents employers from perpetuating discriminatory salary levels. It has been consistently applied by the courts of appeals to claims involving salary discrimination. The Court should deny the petition for certiorari.

III. The Second Question Presented Has Been Waived And, In Any Event Was Definitively Answered In *Morgan*.

Petitioner argues that § 2000e-5(e)'s period for filing a timely charge also functions as a limitation on the availability of a back pay award. In other words, Petitioner maintains that because a plaintiff must file an administrative charge with the EEOC within 300 days after an alleged act of discrimination, an employer cannot be liable for back pay for more than 300 days prior to the filing of the administrative charge. This question is not worthy of review for two reasons.

First, Petitioner has waived this argument. Petitioner complains that the provision of Title VII governing back pay liability, 42 U.S.C. § 2000e-5(g)(1), which provides back pay for up to two years, not 300 days, prior to the filing of the charge, was not relied upon by the court below. Pet. 24 n.3. And for good reason. The court of appeals did state the correct rule regarding back pay liability, Pet. App. 12a, but it did not specifically address whether § 2000e-5(e) circumscribes the period of back pay liability because Petitioner did not raise this argument in either the district court or the court of appeals. It is a long-established principle that, absent unusual circumstances, this Court will not address arguments neither presented nor decided below. *See, e.g., TRW, Inc. v. Andrews*, 122 S. Ct. 441, 451 (2002); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Dothard v. Rawlinson*, 433 U.S. 321, 323, n.1 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted); *Duignan v. United States*, 274 U.S.

195, 200 (1927). Therefore, this Court should decline to address the second question.

Second, this Court recently concluded in *Morgan* that the specific two-year limitation on back pay shows that § 2000e-5(e)'s timely filing requirement was *not* intended to serve as a limitation on back pay liability. *See Morgan*, 122 S. Ct. at 2075 ("If Congress intended to limit liability to conduct occurring in the period within which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of back pay."). Put otherwise, "the timely filing provision was not meant to serve as a specific limitation . . . on damages," but is simply "one in a series of provisions requiring that the parties take action within specified time periods." *Id.*

Petitioner's reading of the timely-filing requirement would nullify Title VII's two-year back pay provision, since it would limit back pay to 300 days in almost all instances, a problem tacitly admitted in Petitioner's footnoted reference to § 2000e-5(g)(1). See Pet. 24 n.3. Petitioner claims that § 2000e-5(g)(1) was a response to the EEOC's original position that liability could extend to the effective date of Title VII. Even if true, this does not advance petitioner's argument. Whatever the impetus for § 2000e-5(g)(1), Congress chose to limit back pay liability for two years, not 300 days.

Recognizing that its position renders § 2000e-5(g)(1)'s two-year back pay provision nearly meaningless, Petitioner attempts to give that provision substance by arguing that it "continues to cap recovery of back pay where equitable considerations toll or delay accrual of the limitations period." Pet. 24 n.3. That argument makes no sense

because Title VII contains *no* express limitation on the two-year period and does not remotely suggest that the two-year rule survives only in cases where equitable principles, such as tolling or estoppel, are applicable. In any event, *Morgan* has already rejected this view. The time period for filing a charge is itself "subject to equitable doctrines such as tolling or estoppel." *Morgan*, 122 S. Ct. at 2072. Petitioner provides no statutory basis for holding that the two-year back pay provision is meant to accommodate these same considerations.

CONCLUSION

For each of the reasons set forth above, the Court should deny the petition for a writ of certiorari.

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On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Tenth Circuit

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Statutes:

42 U.S.C. § 2000e-5(e)(1) . . . . . *passim*

After GM's petition was filed, this Court reaffirmed in *National R.R. Passenger Corp.* v. *Morgan*, 122 S. Ct. 2061 (2002), that a Title VII claim is barred if based on the lingering effects or consequences of discrete discriminatory acts that occurred prior to the charge-filing period. *Morgan* did not resolve whether, as the Tenth Circuit held in this case, that rule is inapplicable if the lingering effects are pay disparities. Respondent offers no reason why this Court should not resolve the sharp circuit split over that important issue.

1. The Decision Below Rested On A Supposed "Paycheck Exception" To Title VII Timeliness Law.

Respondent does not deny that the pay disparities during the charge-filing period resulted entirely from *prior* acts of alleged discrimination. Instead, she mischaracterizes the Tenth Circuit's decision as resting on a "critical fact," namely, respondent's purported failure to learn that her pay was lower than other employees' due to GM's salary confidentiality policy. Opp. 1. But no such "fact" was established in the district court, and that issue was not "critical" or even germane to the decision below.

As respondent admitted and the district court found, she repeatedly complained about her pay level to GM managers long before the charge-filing period. Pet. App. 28a, 42a. These were not generalized gripes about pay but directly raised the discrimination issue:

> In approximately April 1996, plaintiff approached the plant personnel director regarding her compensation. *Plaintiff had*

> *heard that a white clerk at the plant was receiving a salary higher than hers.*

Id. at 28a (emphasis added). Respondent does not even mention these complaints, which cannot be reconciled with her current contention that she was not on notice of any salary disparities until March 1998. In any event, the Tenth Circuit did not base its decision on this asserted "critical fact" but rather on what it called a "crucial distinction" between pay differentials and all other lingering effects of pre-charge period discrimination. Pet. App. 7a. It is that *legal* ruling that petitioner challenges.

2. The Courts Of Appeals Are Divided Over The Validity Of The "Paycheck Exception."

The petition asks this Court to resolve the important question whether pay disparities should be treated differently from other lingering effects of past discriminatory acts when determining the timeliness of a Title VII claim. The courts of appeals are deeply divided on this question. See Pet. 12-17.

Respondent's repeated assertion that other courts of appeals "would have" ruled just as the Tenth Circuit did here (Opp. 3-5) is refuted by the decision below. The Tenth Circuit recognized that its ruling departed from that of the Seventh Circuit in *Dasgupta*, finding "unpersuasive" Judge Posner's opinion that a Title VII claim is barred if based on pay disparities resulting from discriminatory acts that occurred prior to the charge-filing period. Pet. App. 11a. Furthermore, respondent does not try to defend the incoherent distinction between pay and dividends on which the Tenth Circuit rationalized its departure from the

Eleventh Circuit's decision in *Carter*. *Id.* at 9a. And respondent does not even mention the other federal court decisions that have ruled the same as *Dasgupta*. See Pet. 14-15; Chamber of Commerce Amicus Br. 15-16 & n.12.

Respondent tries to minimize the lower courts' conflict and confusion on this issue by characterizing *Dasgupta* and *Carter* as "traditional tolling" cases, as if the only issue was whether the plaintiffs had "reason to know" of their pay disparities. Opp. 3. But that was not the basis of either decision. *Dasgupta* rested on the Seventh Circuit's recognition that the allegedly discriminatory pay disparities were but the "consequences of time-barred violations." 121 F.3d at 1140. And the Eleventh Circuit held the Title VII claims in *Carter* untimely because the lower dividend payments to female employees were but "the inevitable consequence" of discriminatory practices that had occurred prior to the charge-filing period. 225 F.3d at 1265.

These decisions did not rest on tolling, which this Court in *Morgan* said must be "applied sparingly" (122 S. Ct. at 2072), or on whether the "consequences" of the discrimination took the form of pay disparities. Instead, these courts properly recognized that the critical question is whether discrete acts of discrimination occurred before or after the beginning of the charge-filing period. If they occurred before, as in *Dasgupta*, *Carter*, and this case, the Title VII claim is time-barred. If they occurred after (or before *and* after), as in *Bazemore* and *Calloway*, the Title VII claim is timely. The Tenth Circuit, like several other courts of appeals, failed to draw the proper dividing line, misled by the oft-misconstrued "paycheck" sentence from *Bazemore*. See Pet. 15-16, 19-22.

3. The "Paycheck Exception" Conflicts With This Court's Precedents, Including *Morgan*, And With Title VII's Text And Purpose.

Respondent recognizes that this Court's precedents, which bar Title VII claims based on the consequences of discriminatory acts that occurred prior to the filing period, are not tolling decisions. See Opp. 6-7, discussing *Evans*, *Ricks*, and *Lorance*. Instead, respondent attempts to distinguish those cases as involving "a discrete act of discrimination *other than the establishment of a salary*." Opp. at 6 (emphasis added). She thus admits that, in light of this Court's decisions, the supposed "paycheck exception" to the Section 706(e) deadline relied on by the court below is the only way to make her claim actionable.

Respondent offers no textual basis for such an exception, and she does not respond to the petition's showing that the asserted exception, if recognized, would have dire consequences for the resolution of discrimination claims. See Pet. 25-30. The only rationale respondent does offer is indefensible. She suggests that pay disparities must be treated differently from other forms of discrimination because otherwise employers could "hide" intentionally discriminatory pay scales "under the guise of salary confidentiality." Opp. 8. But the fraudulent concealment doctrine protects against any such risk, whether the discrimination involves hiring, promotion, seniority, work assignments, or pay. See *Morgan*, 122 S. Ct. at 2072. There is no reason for courts to carve out generalized subject-matter exceptions to Congressionally mandated filing deadlines when tolling doctrines remain applicable in factually appropriate cases. And there is no

reason why GM should be forced to defend old employment decisions—stretching back 18 years—simply because they may have contributed to Goodwin's current salary. See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 825 (1980) ("Congress clearly intended to encourage the prompt processing of *all* charges of employment discrimination") (emphasis added).

This Court's recent decision in *Morgan* did not address the supposed "paycheck exception" on which the court below relied. However, *Morgan* supports GM's position that there is no such exception. At issue in *Morgan* was the Ninth Circuit's ruling that a Title VII claim is actionable, even if based on discriminatory acts occurring before the filing period, so long as those acts are "sufficiently related" to discriminatory acts, practices, or policies falling within the filing period. This Court held that such claims are barred when based on "discrete discriminatory acts" that occurred prior to the filing period. 122 S. Ct. at 2073. This Court also held that hostile environment claims, which involve "repeated conduct [that] cannot be said to occur on any particular day," may focus on behavior contributing to the hostile environment both prior to and during the filing period. *Ibid.*

The *Morgan* opinion first noted the importance of "strict adherence" to Title VII's filing deadlines in order to give effect to Congress's clear intent to "encourage the prompt processing of all charges of employment discrimination." 122 S. Ct. at 2070. It then explained that the language of Section 706(e), which states that a charge "*shall* be filed" within a set number of days "after the alleged unlawful employment practice *occurred*," makes

"filing a charge within the specified time period *mandatory*." *Ibid.* (emphasis added). Thus, with respect to "discrete acts" of discrimination, a claimant must file a charge by the statutory deadline "or lose the ability to recover for it." *Id.* at 2071.

After showing that its *Evans* and *Ricks* precedents stand for the principle that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges," this Court held that all the discrete acts of discrimination alleged by Morgan (including wrongful suspensions and denials of training) were "untimely filed and no longer actionable." 122 S. Ct. at 2072-2073. That conclusion did not necessarily apply to Morgan's hostile environment claims because their "very nature involves repeated conduct," so that, "in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.* at 2073. This case, by contrast, involves solely allegations of discrete acts of discrimination, not a hostile work environment claim. See Pet. App. 30a. Those acts all occurred prior to the charge-filing period.[1] Thus, applying *Morgan*, respondent's Title VII claim is barred.

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[1] As the district court found, the pay raise received by respondent during the charge-filing period in June 1998, which was equal to or greater on a percentage basis than the raise received by each of her similarly situated co-workers, was not a discrete act of discrimination (even if it resulted in a smaller raise in terms of dollars) but merely "a continuing effect" of salary decisions made prior to the charge-filing period. Pet. App. 46a.

Nothing in *Morgan* indicates that its holding with respect to "discrete acts" applies only to *some* discrete acts, namely, those not involving pay disparities. To the contrary, this Court made clear that, outside the hostile environment context, *all* Title VII claims are barred if based on discrete acts that occurred prior to the filing period, no matter whether their effects or consequences continue to be felt during the filing period. 122 S. Ct. at 2071-2072. Permitting the Tenth Circuit's "paycheck exception" to stand would effectively make *Morgan* a dead letter because plaintiffs could easily circumvent it by depicting all otherwise untimely discrete acts of discrimination as affecting their filing-period pay. See Chamber of Commerce Amicus Br. 9-10.

As explained in the petition (at 19-22), barring claims based on the lingering effects of discrete discriminatory acts is fully consistent with this Court's decision in *Bazemore*. According to respondent, the *Morgan* opinion "acknowledged that *Bazemore* teaches that each discriminatory paycheck is a discrete act of discrimination." Opp. 7. But that is not what this Court said in *Morgan*. Its lone mention of *Bazemore* characterized it as "a pattern-or-practice case [involving] a discriminatory salary structure [in which] the salary discrimination *began* prior to the date that the act was actionable under Title VII." 122 S. Ct. at 2071 (emphasis added). In other words, in *Bazemore* discriminatory patterns or practices occurred before—and *continued to occur during*—the charge-filing period. It was not a case, like this one, involving only the *effects* of discriminatory acts that occurred prior to the filing period. See *Lorance*, 490 U.S.

at 913 n.5 (distinguishing *Bazemore* based on "the timing of the *discriminatory* acts") (emphasis in original). For that reason, the decision below conflicts with *Bazemore*, as well as with *Evans*, *Ricks*, *Lorance*, and *Morgan*.

4. The Length Of The Title VII Damages Period Remains Unresolved.

Respondent also contends that *Morgan* resolved the second issue presented in the petition, namely, whether a Title VII plaintiff may recover damages for a period longer than the charge-filing period. Opp. at 10. However, that issue was not decided in *Morgan*, 122 S. Ct. at 2075, which discussed it in passing only in relation to hostile environment claims, which are not at issue here.

Nor has the second issue been waived, as respondent asserts, on the ground that it was not raised below. Opp. 9. GM *prevailed* on its summary judgment motion in the district court based on plaintiff's untimely EEOC charge and her failure to produce sufficient evidence to create a material issue of fact on GM's liability. In those circumstances, damages were not at issue, and GM had no reason to raise the scope of the period for which damages could be awarded, either in the district court or in the court of appeals. That issue was first raised by the Tenth Circuit in its opinion. See Pet. App. 12a. GM did not waive an issue that it had no need to address prior to its petition and which was actually decided by the court of appeals.

* * *

Both issues presented are of exceptional importance. Substantial doubt over critical aspects of the Title VII claim

process affects not only lower court adjudication but employment relationships throughout the country. This Court should grant the petition to resolve these uncertainties and promote uniform procedures in the resolution of employment discrimination claims. See *Wilson* v. *Garcia*, 471 U.S. 261, 266 (1985) ("compelling reasons for granting certiorari" include "federal interest in uniformity [and in] firmly defined, easily applied rules" to end "conflict, confusion, and uncertainty" about the timeliness of civil rights claims).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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